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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER 1994 TERM

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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50 pp

QUESTION PRESENTED

1. Whether an Assistant Attorney General for the State of Colorado is entitled to absolute prosecutorial immunity for conduct undertaken as an advocate on behalf of the State in a habeas corpus proceeding.

PARTIES TO THE PROCEEDING

The names of the parties to the proceeding appear in the caption of this petition, except for co-defendant Gale Norton, Attorney General for the State of Colorado. The United States Court of Appeals for the Tenth Circuit's opinion affirmed the district court's dismissal of plaintiff's complaint against Ms. Norton. Ms. Norton is therefore not a party to this petition for writ of certiorari.

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OPINION BELOW

1. The decision of the United States Court of Appeals for the Tenth Circuit has been published at 35 F.3d 1473 (10th Cir. 1994).

JURISDICTION

The Tenth Circuit issued its opinion reversing in part the district court's order of dismissal on September 16, 1994. This Court retains jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Gagan's State Court Criminal Case

In 1988, respondent, Cary James Gagan ("Gagan") was convicted of theft, criminal attempt to commit theft and criminal impersonation in the District Court of Arapahoe County, Colorado. He appealed his convictions to the Colorado Court of Appeals. In 1990, the convictions were affirmed in *People v. Gagan*, No. 88CA0916, 88CA0982 (Colo. App. May 24, 1990) (not selected for official publication), *cert. denied*, November 13, 1990. Petitioner Wendy Ritz ("Ritz"), an Assistant Attorney General, represented the People of the State of Colorado in the appeal.

2. Gagan's Habeas Corpus Proceeding In The United States District Court For The District Of Colorado, Civil Action No. 91-C-0005

On January 7, 1991, Gagan filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado in Civil Action No. 91-C-0005 naming Frank Gunter (Executive Director of the Colorado Department of Institutions) and the Attorney General of the State of Colorado (Gale Norton) as respondents. On February 11, 1991, the respondents, represented by Ritz, filed an answer. On March 4, 1991, Magistrate Judge Richard Borchers ordered the clerk of the district court of Arapahoe County to file the state trial court record with

the clerk of the United States District Court for the District of Colorado.

On March 22, 1991, Gagan filed a *pro se* motion for preparation of transcripts at state expense in the district court of Arapahoe County (dated March 18, 1991) in Criminal Case Nos. 86 CR 539/86 CR 451 requesting that certain transcripts be prepared "for a fair determination of the U.S. District Court (Colorado) of the Defendant's denial of speedy trial claims." Although Gagan sent a copy of the motion to Ritz, Ritz sent the motion to the Arapahoe County District Attorney's Office because:

> the District Attorney's Office represents the interests of the People at the state trial court level. The Attorney General's Office was not a party to the proceedings in Arapahoe County . . . .

On the same day, March 22, 1991, Judge Joyce S. Steinhardt of the District Court of Arapahoe County granted Gagan's *pro se* motion by handwriting "Motion for Preparation of Transcripts granted" on the first page of the motion. Judge Steinhardt, however, did not set a deadline for the preparation of the transcripts. Furthermore, there was no indication in the handwritten order that Judge Steinhardt served, or caused to be served, the handwritten order on Norton or Ritz.

In July 1991, the clerk of the district court in Arapahoe County filed a "Notice of Record Certified to the Appellate Court" in the habeas corpus proceeding. The notice stated:

> You and each of you will take notice that the Reporter's Transcripts (4) . . . has been duly certified and mailed to the Clerk of the U.S. District Court on the 19th day of July, 1991 A.D.

Through the federal public defender, Gagan filed a motion to complete record in the habeas corpus proceeding on November 7, 1991. The motion indicated that transcripts from several proceedings in the state trial court had not been included in the

record transmitted to the United States District Court. The motion, however, did not disclose that Judge Steinhardt had granted the *pro se* motion for preparation of transcripts at state expense in Gagan's state criminal cases.

By order dated November 8, 1991, Judge Jim R. Carrigan granted in the habeas corpus proceeding Gagan's motion to complete record and ordered the respondents to complete the record by supplying various state court transcripts. (Exhibit F) On January 15, 1992, respondents in the habeas corpus proceeding, through Ritz, filed a status report and motion for reconsideration which stated in part:

> 3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.
>
> 4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.
>
> 5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not providing these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. *Engle v. Isaac,* 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.
>
> 6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of

> this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

On January 23, 1992, Gagan, through the federal public defender, filed a response to this status report which stated in part:

> 3. Counsel suggests that the Court order preparation and filing of the requested transcripts . . . .
>
> 4. When counsel made the request to supplement the record, counsel was unaware that certain transcripts had not ever been prepared. In terms of arranging payment for transcripts, counsel will be happy to prepare the necessary transcript order forms and CJA vouchers.

Gagan's response did not refer to Judge Steinhardt's March 22, 1991 order.

By March 25, 1992, the federal district court in the habeas corpus proceeding had not entered an order regarding the respondents' motion for reconsideration. On March 25, 1992, however, Judge Deanna E. Hickman entered an order in Criminal Case No. 86 CR 451 in Arapahoe County which stated, in part:

> This Judge was informed by court reporter Janice Hibbard on March 23, 1992, that she stood ready, willing and able to transcribe these proceedings and had already pulled her notes to do so, but that she had been instructed by Assistant Attorney General Wendy Ritz not to comply with Chief Judge Steinhardt's order and instructed not to prepare the transcripts. In a telephone conversation between this Judge and Ms. Ritz on March 24, 1992, Ms. Ritz confirmed this; to wit, that she did not think these transcripts were necessary and that she instructed the court reporter not to prepare court ordered transcripts. She never notified this Court

> of her instruction and this Court was under the impression that transcript were being prepared.

(Exhibit D) Judge Hickman ordered that "Ritz cease and desist from further interference or countermanding of orders of the District Court, Arapahoe County" and ordered that the transcripts be prepared within 30 days.

Apparently, when Judge Hickman entered the March 25, 1992 order, she was not aware of the existence or contents of the January 15, 1992 status report and motion for reconsideration filed in the habeas corpus proceeding by Ritz.

After learning of Judge Hickman's order, Ritz filed a motion to withdraw the motion for reconsideration in the habeas corpus proceeding on March 30, 1992. In conjunction with this motion, Ritz submitted an affidavit which stated that she had been unaware of Judge Steinhardt's order regarding preparation of the transcripts at the time she contacted the court reporters in connection with her representation of the respondents in the habeas corpus proceeding, and that her actions in this regard were focused on Judge Carrigan's order in the habeas corpus proceeding. (Exhibit G)

Judge Hickman subsequently entered an order on June 1, 1992, which stated that " . . . in light of [Ritz's]statement that [she was] unaware of Judge Steinhardt's order, the Court will withdraw its [March 25, 1992] opinion in part. All of the Order will be withdrawn except that portion ordering transcripts prepared within 30 days." (Exhibit E)

By July 24, 1992, the state court transcripts requested by Gagan were filed in the habeas corpus proceeding. On or about May 7, 1993, the federal district court dismissed Gagan's petition for writ of habeas corpus. The dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit in Case No. 92-1253 on March 31, 1994. *Gagan v. Gunter*, 1994 WL 108935 (10th Cir. 1994).

3. Gagan's Civil Action Against Norton And Ritz

On April 7, 1992, Gagan filed his complaint against Norton and Ritz alleging a violation of 42 U.S.C. § 1983. The United States District Court for the District of Colorado exercised jurisdiction pursuant to 28 U.S.C. § 1331. In essence, Gagan contended that sometime between June 1, 1991 and July 1, 1991, "Ritz informed court reporter Janice Hibbard not to comply with Chief Judge Steinhardt's order to prepare transcripts of court hearings." Norton and Ritz filed a motion to dismiss Gagan's complaint.

On February 5, 1993, the recommendation of United States Magistrate Judge O. Edward Schlatter was entered. (Exhibit C) In the recommendation, the Magistrate Judge found:

> At the time Ms. Ritz is alleged to have told the court reporter not to prepare the transcripts, Ms. Ritz was the attorney of record for the state of Colorado in Mr. Gagan's federal corpus action. When Mr. Gagan asked the state court to order preparation of the transcripts, the federal habeas case was the only pending action to which the transcripts might have been relevant. Mr. Gagan's motion for preparation of the transcripts refers repeatedly to his need for the transcripts in the federal habeas proceeding and mentions only obliquely the possibility of seeking post-conviction relief in state court.
>
> There is no question that the preparation of the transcripts was directly related to the federal habeas case. The fact that the transcripts in question had not been part of the record in Mr. Gagan's state court appeal does raise some question as to whether the transcripts could properly be considered in a federal habeas action. *See Rose v. Lundy*, 455 U.S. 509 (1982) (federal habeas court should not consider claims unless state courts have had an opportunity to consider same claims.) Thus, for the purpose of the federal habeas

> action, there was a legitimate question of whether the transcripts needed to be prepared. In such circumstances, it is common for attorneys to work with court reporters to coordinate when, or whether, transcripts should be prepared. Ms. Norton's and Ms. Ritz's alleged actions with regard to the transcripts, whether proper or not, were intimately associated with their roles as advocates for the state of Colorado in the federal case. Thus, absolute immunity protects Ms. Norton and Ms. Ritz from liability for money damages based on these actions.

Judge Zita L. Weinshienk of the United States District Court for the District of Colorado then entered the order of dismissal finding:

> Since the transcripts in question had not been part of the record in the state court appeal, there was a legal question as to whether the transcripts could be considered in a federal habeas action. Therefore any alleged action on the part of Ms. Norton or Ms. Ritz with regard to the transcripts would be associated with their role as advocates for the state of Colorado in the federal habeas case.

(Exhibit B) Because Judge Weinshienk ruled that Norton and Ritz "are protected by prosecutorial immunity for such actions," Gagan's complaint was dismissed with prejudice.

The United States Court of Appeals for the Tenth Circuit reversed in part and remanded. (Exhibit A) The court affirmed the trial court's dismissal of Gagan's complaint against Norton. 35 F.3d at 1476, n.4. However, the court reversed the district

court's determination that Ritz was entitled to absolute immunity and remanded for a determination whether she was entitled to qualified immunity.[1]

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

A. The Assistant Attorney General for the State of Colorado Is Entitled to Absolute Prosecutorial Immunity for Conduct Undertaken as an Advocate on Behalf of the State in a Habeas Corpus Proceeding

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), this Court first addressed the issue whether a state prosecuting attorney who acts within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of a defendant's constitutional rights. The Court determined that the same considerations that underlie the common law immunities of judges and which grant jurors acting within the scope of their duties absolute immunity should extend to state prosecutors. These considerations included the concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. 96 S.Ct. at 991. This Court held that in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983. 96 S.Ct. at 995.

The *Imbler* progeny has extended prosecutorial immunity to a variety of situations deemed by the courts to be intimately associated with the judicial process. Generally, *Imbler* extends absolute immunity to prosecutors from civil suits for damages

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[1] The court also remanded with directions that the district court determine whether Gagan's motion for leave to amend his complaint to join the court reporters as additional defendants should be granted.

based on acts performed within the scope of the prosecutor's function as an advocate. *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981). *See, e.g., Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (absolute immunity extends to prosecutor in probable cause hearing); *East Coast Novelty Co., Inc. v. City of New York*, 809 F.Supp. 285, 291 (S.D.N.Y. 1992) (drafting and obtaining search warrant to confiscate property); *Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (alleged failure to investigate before initiating prosecution); *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (allegation that prosecutors induced witnesses to commit perjury); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983) (pressing charges without proper jurisdiction); *Pachaly v. City of Lynchburg*, 897 F.2d 723, 727-28 (4th Cir. 1990) (participating in a post-indictment search); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (failure to prosecute after charges filed).

It is only where the prosecutor's function can be characterized as administrative or investigative that only qualified, as opposed to absolute, immunity extends to his activities. *See Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990); *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992); *see also Burns v. Reed, supra* (absolute immunity does not extend to a prosecutor's imparting legal advice to police officers).

The case which appears to extend absolute prosecutorial immunity to factual circumstances most closely analogous to those presented here is *Webster v. Gibson*, 913 F.2d 510 (8th Cir. 1990). In *Webster* the plaintiff prisoner brought civil rights actions pursuant to 42 U.S.C. § 1983 against a prosecutor, sheriff, and deputy sheriff for allegedly depriving him of a prompt judicial determination of probable cause. With respect to the prosecutor, the plaintiff alleged that he had exceeded the scope of his prosecutorial duties when he allegedly disregarded a state circuit judge's order to file an information or release the plaintiff. The plaintiff alleged that by so "countermanding" a state court order, the prosecutor stepped outside the bounds of his advocacy function and lost the absolute immunity he would

otherwise have enjoyed. The United States Court of Appeals for the Eighth Circuit disagreed. The Court held:

> [Plaintiff's] allegation that the prosecutor disregarded a court order to file an information would not place him outside the scope of his prosecutorial duties. Thus, we conclude the district court was correct in finding that the prosecutor had absolute immunity, and [plaintiff's] section 1983 action insofar as it contained allegations against the prosecutor was properly dismissed.

913 F.2d at 514.

Petitioner submits that the flaw in the Tenth Circuit's reasoning in this case stems from its focus on Gagan's allegation that Ritz "countermanded" a state court judge's order directing a court reporter to prepare transcripts, and ignores the context in which this alleged conduct occurred. The court held:

> Applying these principles to this case, we cannot agree with the district court that a prosecutor's actions in allegedly countermanding a state court judge's order directing a court reporter to prepare transcripts for use by an indigent pro se litigant in the civil action, constitutes the type of conduct protected by absolute immunity under *Imbler* and its progeny.

35 F.3d at 1476. What this holding neglects to address is that the civil action in which the *pro se* litigant intended to use the transcripts is the habeas corpus proceeding in which Ritz was representing the Office of the Attorney General of the State of Colorado, a function which is simply the latter or appellate stage of the judicial phase of a criminal prosecution.

Absolute immunity extends to government attorneys who conduct and defend civil actions. See, e.g., *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991); *Meade v. Grubbs*, 841 F.2d 1512, 1532 (10th Cir. 1988). Habeas corpus is a civil proceeding, *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d. 724 (1987); *Abel v. Tinsley*, 338 F.2d 514 (10th Cir. 1964), the purpose of which is to inquire into the legality of a

prisoner's detention. *See Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Ritz's representation of the Office of Attorney General in *Gagan v. Frank Gunter and Attorney General for the State of Colorado* was, obviously, undertaken in her advocacy function as Assistant Attorney General for the State of Colorado, and arose out of her previous representation of the State in the state criminal case against Gagan. The fact that her alleged conduct in instructing court reporters not to prepare a transcript requested by Gagan for use in that habeas corpus proceeding purportedly countermanded a collateral state court order is of no consequence. Whether Ritz requested the court reporters to refrain from preparing the transcripts with or without knowledge of Judge Steinhardt's order, her actions in this regard were directed exclusively to the habeas corpus proceeding in her capacity as advocate for the Attorney General for the State of Colorado, and not for any other conceivable administrative or investigative purpose. Consequently, the same considerations which underlie the extension of prosecutorial immunity to all other advocacy functions in criminal and civil proceedings of necessity extend to Ritz's advocacy function in the habeas corpus proceeding. *See Imbler v. Pachtman, supra, Webster v. Gibson, supra.*

Therefore, petitioner respectfully submits that the United States Court of Appeals for the Tenth Circuit's decision is erroneously reasoned, conflicts with this Court's decision in *Imbler v. Pachtman, supra*, and must be reversed.

CONCLUSION

Petitioner's petition for writ of certiorari presents an apparent issue of first impression, i.e., whether a state prosecutor's actions undertaken as an advocate for the state attorney general's office in a habeas corpus proceeding is entitled to absolute prosecutorial immunity. The United States Court of Appeals for the Tenth Circuit's decision refusing to extend this immunity conflicts with the rationale set forth by this Court in *Imbler v. Pachtman, supra.* An attorney general representing the state in a

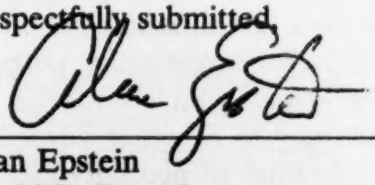
habeas corpus proceeding is no less subject to harassment by unfounded litigation, and no less likely to shade her decisions instead of exercising the independence of judgment required by her public trust, than she would be in any other criminal or civil proceeding while performing her advocacy functions.

The Tenth Circuit's decision also conflicts with the United States Court of Appeals for the Eighth Circuit's decision in *Webster v. Gibson, supra,* to the extent the Tenth Circuit premised its decision on the allegation that the Assistant Attorney General "countermanded" a court order.

Consequently, petitioner submits that certiorari review is imperative. U.S. Sup. Ct. Rule 10.1(a) and (c).

Dated this 14th day of December, 1994.

Respectfully submitted,



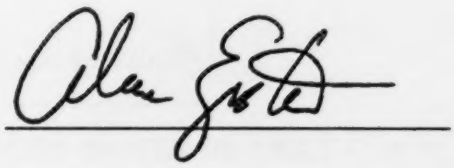
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CERTIFICATE OF MAILING

I hereby certify that on this 14th day of December, 1994 a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Cary James Gagan
General Delivery/U.S.P.O.
Cherry Creek Station
Denver, Colorado 80206



APPENDIX A

United States Court of Appeals

FOR THE TENTH CIRCUIT

CARY JAMES GAGAN,

Plaintiff-Appellant,

v.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado;
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado,

Defendants-Appellees.

No. 94-1132

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 92-Z-655)

Submitted on the briefs:*

Cary James Gagan, pro se.

David R. Brougham and LaDonne Bush of Hall & Evans, L.L.C., Denver, Colorado, for defendants-appellees.

Before TACHA, BRORBY, and EBEL, Circuit Judges.

BRORBY, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Gagan, a pro se litigant, appeals the decision of the district court dismissing his 42 U.S.C. § 1983 complaint against the defendants, who are the Attorney General and an Assistant Attorney General of the State of Colorado, on the grounds that the defendants were entitled to absolute immunity for their actions in allegedly[1] countermanding the order of a Colorado state court. We affirm with respect to the Attorney General, albeit for different reasons than those given by the district court, but we reverse and remand as to the Assistant Attorney General.

BACKGROUND

In 1988, Mr. Gagan was convicted of theft, criminal attempt to commit theft and criminal impersonation in the District Court for Arapahoe County, Colorado. With the assistance of appointed counsel, Mr. Gagan appealed his conviction to the Colorado Court of Appeals. The State of Colorado was represented by defendant Wendy Ritz, an Assistant Attorney General. On May 24, 1990, the Colorado Court of Appeals affirmed his conviction, and the Colorado Supreme Court denied review on November 11, 1990.

Dissatisfied with appellate counsel's failure to raise an issue relating to an alleged violation of his right to a speedy trial, Mr. Gagan filed a pro se action in federal court on January 7, 1991 seeking a writ of habeas corpus. In order to prepare for that action, he filed an ex parte pro se motion in state court requesting that certain transcripts be prepared at the government's expense. On March 22, 1991, the state court judge granted the motion for transcripts by simply endorsing the motion itself.

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[1] The case is before us on the district court's order granting the defendants' motions to dismiss pursuant to Rule 12(b)(6). Therefore, we "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991); *see also Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993). In addition, because the plaintiff is proceeding pro se, we must construe his pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

Mr. Gagan alleges that defendant Ritz thereafter allegedly ordered the court reporter not to prepare the transcripts, notwithstanding the state court judge's order to the contrary, because she believed his petition should be dismissed on procedural grounds.[2] The state court judge termed the defendant's conduct "outrageous" and ordered the Attorney General's office to cease and desist from ever similarly proceeding.

The transcripts at issue were ultimately prepared in July of 1992, and the district court thereafter dismissed Mr. Gagan's petition, a decision that we affirmed. *See Gagan v. Gunter,* (unpublished Order & Judgment), 21 F.3d 1121 (10th Cir. Mar. 31, 1994).

The gist of the plaintiff's complaint in this § 1983 case is that the defendants' actions in countermanding the state court judge's order to prepare the transcripts was essentially a violation of his "constitutional" right of access to the courts. *See Bounds v. Smith,* 430 U.S. 817 (1977).[3] The district court below relied upon our decisions in *Pfeiffer v. Hartford Fire Ins. Co.,* 929 F.2d 1484 (10th Cir. 1991), and *Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990), *cert. denied,* 111 S. Ct. 1622 (1991), which interpreted, *inter alia, Imbler v. Pachtman,* 424 U.S. 409 (1976), and concluded that the defendants' actions as state prosecutors were covered under the protective umbrella of absolute immunity. *See* Order of Dismissal, Jan. 14, 1994 at 3.

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[2] In *Rose v. Lundy,* 455 U.S. 509 (1982), the Supreme Court adopted a "total exhaustion rule" for so-called "mixed" petitions — those containing both exhausted and unexhausted claims — for a writ of habeas corpus. *Id.* at 522. Because Mr. Gagan's speedy trial claim was unexhausted, it was arguably subject to dismissal under *Rose.*

[3] The plaintiff's complaint alleges various other constitutional violations including due process, equal protection, and the First and Eighth Amendment. While we perceive the issue to be primarily one implicating the right of access, we express no opinion as to the other constitutional claims asserted, and we leave that for the district court to consider in the first instance.

DISCUSSION

I.

We review *de novo* a district court's conclusion on the question of absolute immunity. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985), quoted in *Snell,* 920 F.2d at 675. Because the matter is before us on the district court's order granting a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept the allegations of the complaint as true. *Doyle,* 998 F.2d at 1566.

State prosecutors are entitled to absolute immunity against suits brought pursuant to § 1983 for activities "'*intimately associated* with the judicial . . . process,'" such as initiating and pursuing criminal prosecutions. *Pfeiffer,* 929 F.2d at 1489 (emphasis added) (quoting *Imbler,* 424 U.S. at 430-31). Of course, "'actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor.'" *DiCesare v. Stuart,* 12 F.3d 973, 977 (10th Cir. 1993) (quoting *Buckley v. Fitzsimmons,* 113 S. Ct. 2606, 2615 (1993)). Indeed, we have repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute, immunity. *See Pfeiffer,* 929 F.2d at 1490 & n.6 (citing *Rex v. Teeples,* 753 F.2d 840, 843-44 (10th Cir.), *cert. denied,* 474 U.S. 967 (1985)); *accord Snell,* 920 F.2d at 686; *Lavicky v. Burnett,* 758 F.2d 468, 476 (10th Cir. 1985), *cert. denied,* 474 U.S. 1101 (1986).

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (*i.e.,* absolute and qualified immunity), we have held "'the determinative factor is "advocacy" because that is the prosecutor's main function.'" *Pfeiffer,* 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); *Spielman v. Hildebrand,* 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that absolute immunity will attach." *Pfeiffer,* 929 F.2d at 1490 (citing *Snell,* 920 F.2d at 687).

Applying these principles to this case, we cannot agree with the district court that a prosecutor's actions in allegedly countermanding a state court judge's order directing a court reporter to prepare transcripts for use by an indigent pro se litigant in a civil action, constitutes the type of conduct protected by absolute immunity under *Imbler* and its progeny. While we are sensitive to the important public policies furthered by absolute immunity, *Snell,* 920 F.2d at 687, we also heed the Supreme Court's admonition that absolute immunity is the exception and not the rule. "We have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." *Burns v. Reed,* 111 S. Ct. 1934, 1939 (1991) (internal quotation marks and citations omitted); *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982) (noting that "[f]or executive officers in general, . . . qualified immunity represents the norm"); *Butz v. Economou,* 438 U.S. 478, 507 (1978); *Spielman* 873 F.2d at 1382.

We find it difficult to see how a prosecutor's actions in contravening the authority of the judicial branch of state government in regard to the defense of a civil action constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings, even under the most generous interpretation of that phrase, to which absolute immunity attaches. *See Spielman,* 873 F.2d at 1382 ("We must therefore determine whether the defendants' actions in this case constituted advocacy functions sufficiently related to initiating judicial proceedings to justify absolute immunity."). Stated alternatively, the actions at issue in this case are simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing criminal prosecutions to be covered by absolute immunity. We therefore conclude that the Assistant Attorney General has failed to carry her burden, *see Burns,* 111 S. Ct. at 1939, of demonstrating her

entitlement to absolute immunity, and accordingly, we reverse the district court's order of dismissal in this regard.[4]

Due to the district court's disposition of this matter on the basis of absolute immunity, it had no occasion to consider defendant Ritz's alternative argument that qualified immunity was warranted. We therefore remand the case to the district court to decide the applicability, if any, of the defense of qualified immunity under these circumstances.

II.

Mr. Gagan also appeals an issue relating to the district court's order denying his motion for leave to amend his complaint to name the court reporters as additional defendants. The district judge adopted the magistrate judge's recommendation, over Mr. Gagan's objection, to deny the motion to amend the complaint. While we express no opinion as to the propriety of this ruling, *as a matter of federal civil procedure,* we are troubled by the somewhat circular reasoning employed by the court below. In essence, the district court concluded that because the court reporters could avail themselves of qualified immunity under these circumstances, *see Antoine v. Byers & Anderson, Inc.,*

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[4] While our conclusion on the absolute immunity issue would be the same with respect to the Attorney General herself, we believe the suit against her was properly dismissed, albeit for different reasons.

A supervisor may not be held liable in a § 1983 action under the theory of respondeat superior. *Monell v. Department of Social Serv.,* 436 U.S. 658, 691-95 (1978). The plaintiff must establish some "affirmative link" between the deprivation and personal control by the supervisor in order to establish the supervisor's liability. *Meade v. Grubbs,* 841 F.2d 1512, 1527 (10th Cir. 1988) (citation omitted). Because we find nothing in the complaint that would support such a conclusion, we affirm the dismissal of the action against Attorney General Norton. *See Schepp v. Fremont County,* 900 F.2d 1448, 1454 (10th Cir. 1990) (quoting *Griess v. Colorado,* 841 F.2d 1042, 1047 (10th Cir. 1988) (finding affirmance proper on appeal on any ground where the record is adequate to permit the appellate court to determine the ultimate legal conclusion)).

113 S. Ct. 2167 (1993), their joinder would be futile and therefore the motion to amend should be denied.

Initially, we point out that the defense of qualified immunity, which the district court correctly noted would be the standard of immunity that would apply to a court reporter, is an affirmative defense that must be raised by the party alleging it. *See Gomez v. Toledo,* 446 U.S. 635, 640-41 (1980); Fed. R. Civ. P. 8(c). In this case, however, before the court reporters can raise this defense, the propriety of joining them as defendants must first be determined as a matter of federal civil procedure. Therefore, we must reverse the district court's conclusion and remand for a determination as to the preliminary procedural question of whether Mr. Gagan's motion for leave to amend his complaint is warranted.

If the motion for leave to amend is granted, *see Stichting Mayflower Recreational Fonds v. Newpark Resources, Inc.,* 917 F.2d 1239, 1249 (10th Cir. 1990); *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.,* 820 F.2d 1127 (10th Cir. 1987), and the court reporter defendants do in fact assert the defense of qualified immunity, then we note the burden of showing that there was a violation of clearly established legal rights is shifted to the plaintiff. *See Applewhite v. United States Air Force,* 995 F.2d 997, 1000 (10th Cir. 1993), *cert. denied,* 114 S. Ct. 1292 (1994); *Medina v. City & County of Denver,* 960 F.2d 1493, 1497 (10th Cir. 1992); *cf. DeLancy v. Caldwell,* 741 F.2d 246, 1247 (10th Cir. 1984) (holding that due process protects against a court reporter's excessive delay in furnishing transcripts).

We therefore REVERSE the district court's order granting the defendants' motion to dismiss on the basis of absolute immunity, and REMAND this case to the district court for a determination as to the availability of qualified immunity. In addition, we REVERSE the district court's order denying the plaintiff's motion to amend his complaint to name additional defendants in so far as the basis for its ruling was a determination on the question of qualified immunity and not a matter of procedure, and REMAND the case for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-655

CARY JAMES GAGAN,

Plaintiff,

v.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado; and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado

Defendants.

ORDER OF DISMISSAL

Plaintiff Cary James Gagan, appearing pro se, filed this Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 against Gail Norton, in her capacity as Attorney General for the State of Colorado, and Wendy Ritz, in her capacity as Assistant Attorney General for the State of Colorado. Mr. Gagan alleges that his federal civil rights were violated by a several month delay in preparing complete transcripts of the proceedings in his criminal case in state court, a delay Mr. Gagan asserts was intentionally orchestrated by Ms. Norton and Ms. Ritz. In addition, Mr. Gagan requests permission to add two court reporters as defendants, alleging that they, too, contributed to the delay. Defendants filed a motion to dismiss.

Pursuant to D.C.COLO.LR. 72.4, this matter was referred to United States Magistrate Judge Edward O. Schlatter, who filed a Recommendation Of United States Magistrate Judge in which he recommended that defendants' motion to dismiss be granted and that plaintiff's request to add the two court reporters as defendants be denied. Plaintiff has filed objections to the Magistrate Judge's Recommendation. The Court is required to

review de novo all portions of the Magistrate Judge's Recommendation to which objections have been filed. *See* 28 U.S.C. § 636(b)(1).

The main issue presented by this case is whether court reporters are protected by absolute immunity. Because of the lack of Tenth Circuit precedent on point, the Magistrate Judge applied Tenth Circuit decisions holding that activities of a court employee taken either at the direct order of a judge or which are intimately associated with the judicial process are protected by absolute immunity. *See, e.g., Valdez v. City and County of Denver,* 878 F.2d 1285 (10th Cir. 1989); *Tripati v. United States I.N.S.,* 784 F.2d 345 (10th Cir. 1988), *cert. denied,* 484 U.S. 1028 (1988). He also relied on several Seventh and Ninth Circuit cases granting absolute immunity to court reporters, including *Antoine v. Byers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991) (granting absolute immunity to court reporters because "the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process.").

In June 1993, after the Recommendation was filed, the Supreme Court rejected giving court reporters absolute immunity because they are part of the judicial function, and overruled the Seventh and Ninth Circuit cases relied on by the Magistrate Judge. *Antione v. Byers & Anderson,* 61 U.S.L.W. 4562, 4563 (U.S. June 7, 1993). The Supreme Court stated, "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." The Supreme Court also cited favorably *McLallen v. Henderson,* 492 F.2d 1298 (8th Cir. 1974) (court reporters not absolutely immune because their duties are ministerial, not discretionary, in nature; granting qualified immunity), and *Green v. Maraio,* 722 F.2d 1013 (2d Cir. 1983) (giving court reporters qualified immunity).

Even if the reporters are protected by qualified rather than absolute immunity, this Complaint still must be dismissed for failure to state a claim upon which relief can be granted. In his complaint, Mr. Gagan asserts that Attorney General Norton and Ms. Ritz directed the reporters to delay the transcripts. This

allegation brings this case directly within the parameters of *Green v. Maraio,* 722 F.2d 1013, 1019 (1983), cited in *Antoine.*

In *Green,* the plaintiff alleged that the court reporter altered transcripts pursuant to the Judge's instructions. Thus the complaint itself established the circumstance required as a predicate to a finding of qualified immunity. The *Green* court held that since the Judge was protected by absolute immunity, "it would be manifestly unfair to allow Maraio to be subjected to liability when she was acting within the scope of the judge's instructions." *Green v. Maraio,* 722 F.2d 1013, 1019 (2d Cir. 1983). *Green,* 722 F.2d at 1019.

The facts are similar in Mr. Gagan's case. Under *Green,* the court reporters are protected from liability if they are acting under orders of a person who is protected. In his Recommendation, Magistrate Judge Schlatter found that Attorney General Norton and Ms. Ritz were protected by prosecutorial immunity, citing *Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990), *cert. denied,* 111 S. Ct. 1622 (1991), and *Pfeiffer v. Hartford Fire Insurance Co.,* 929 F.2d 1484 (10th Cir. 1991). Since the transcripts in question had not been part of the record in the state court appeal, there was a legal question as to whether the transcripts could be considered in a federal habeas action. Therefore, any alleged action on the part of Ms. Norton or Ms. Ritz with regard to the transcript would be associated with their role as advocates for the state of Colorado in the federal habeas case. Under *Snell,* they are protected by prosecutorial immunity for such actions, and, if Mr. Gagan's allegations that the court reporters were acting under orders of Ms. Norton and Ms. Ritz are true, the reporters too are protected. Accordingly, it is

ORDERED that Defendants' Motion To Dismiss Complaint With Prejudice is granted, and plaintiff's Complaint filed under 42 U.S.C. § 1983 and this cause of action are dismissed with prejudice. It is

FURTHER ORDERED that Defendants' Motion To Strike Portions Of Plaintiff's Response To Defendant's Motion To Dismiss Complaint With Prejudice is moot. It is

FURTHER ORDERED that the plaintiff's motion to add court reporters as defendants are denied. It is

FURTHER ORDERED that all other pending motions are denied.

DATED at Denver, Colorado, this 14th day of January, 1994.

BY THE COURT:

/s/ ZITA L. WEINSHIENK

ZITA L. WEINSHIENK, *Judge*
United States District Court

January 14, 1994

Civil Action No. 92-Z-655

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER OF DISMISSAL entered by Judge Zita L. Weinshienk and filed on January 14, 1994, were mailed to the following:

Cary James Gagan
3000 E. Colfax, #272
Denver, CO 80206

LaDonne Bush, Esq.
Hall & Evans
1200 Seventeenth Street
Suite 1700
Denver, CO 80202-5817

Magistrate Judge O. Edward Schlatter

JAMES R. MANSPEAKER, *Clerk*

By: _____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 Z 655

CARY JAMES GAGAN,

Plaintiff,

v.

GALE NORTON, in her individual capacity as Attorney General for the state of Colorado, and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the state of Colorado,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Cary Gagan, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. In his Complaint, the Plaintiff alleges that his federal civil rights have been violated because of a delay in preparing complete transcripts of the proceedings in his criminal case in state court. Mr. Gagan alleges that the Defendants intentionally orchestrated the delay in preparing the transcripts. Mr. Gagan has also moved the court to permit him to add two court reporters as additional defendants, alleging that they contributed to the delay. Mr. Gagan seeks money damages as relief for the alleged violations. The Defendants have filed a Motion to Dismiss, Mr. Gagan has responded and the Defendants have replied. The parties have included several exhibits and affidavits with their various filings.

Pursuant to Rules 603 and 605 of the Local Rules of Practice of the United States District Court for the District of Colorado, this matter has been referred to Magistrate Judge O. Edward Schlatter. Magistrate Judge Schlatter hereby makes the following recommendation.

As Plaintiff is representing himself, his Complaint will be construed liberally. *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972); *Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir. 1979). A complaint must be dismissed if, accepting the allegations as true, it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Meade v. Grubbs,* 841 F.2d 1512, 1526 (10th Cir. 1988). To state a valid claim under §1983 plaintiff must allege that the defendants deprived him of a right secured by the United States Constitution while they acted under color of state law. *Adickes v. S. H. Kress and Co.,* 398 U.S. 144, 150 (1970).

I. FACTS

Mr. Gagan was convicted on felony criminal charges in state court and those convictions were affirmed by the Colorado Court of Appeals in November, 1990. Defendant Wendy Ritz, an Assistant Attorney General with the Colorado Attorney General's office, represented the state of Colorado in Mr. Gagan's appeal. In January of 1991, Mr. Gagan filed a pro se petition for writ of habeas corpus with the United States District Court for the District of Colorado. The Respondents in Mr. Gagan's habeas case were represented by Ms. Ritz. The Respondents filed a response to Mr. Gagan's habeas petition in March, 1991. On March 4, 1991 the United States Magistrate handling Mr. Gagan's habeas petition ordered the Clerk of the Arapahoe County District Court to file the state trial court record with the United States District court for the purpose of resolving Mr. Gagan's habeas petition.

Mr. Gagan feels his attorneys did not raise some legitimate issues in his state court appeal. Therefore, Mr. Gagan felt he needed additional portions of the state court record transcribed for the purpose of his federal habeas action, and possibly for use in post-conviction proceedings in state court. These records had not been transcribed for Mr. Gagan's state court appeal. In March of 1991, Mr. Gagan filed a Motion for Preparation of Transcripts at State Expense with the Arapahoe County District

Court, the state court which conducted Mr. Gagan's criminal trial. Exhibit B to the Complaint. The Motion discusses in detail Mr. Gagan's efforts to obtain relief via his federal habeas case. Ms. Ritz was served with a copy of this Motion. A state District Court judge granted Mr. Gagan's Motion on March 22, 1991 by making a hand written notation on the first page of the Motion. The order did not set a deadline for preparation of the transcripts.

At least three court reporters were involved in reporting the hearings Mr. Gagan sought to have transcribed. On April 11, 1991, one of the court reporters wrote to Mr. Gagan and said she was coordinating the preparation of the requested transcripts among the court reporters involved. Exhibit 2 to Plaintiff's Response to Defendants' Motion to Dismiss Complaint with Prejudice. Although the state court judge had not set a deadline for preparation of the transcripts, the court reporter said in her letter that she expected the transcripts would be complete by July 1, 1991. Although some of the transcripts were completed promptly, Mr. Gagan alleges that the set of transcripts he requested was not fully complete until July 23, 1992. See Plaintiff's Motion to Amend Complaint, filed September 10, 1992, p. 5.

Sometime after the state court had granted Mr. Gagan's motion for preparation of transcripts, Mr. Gagan filed in state court a motion for post-conviction relief under Rule 35(c) of the Colorado Rules of Civil Procedure. Apparently, this motion was filed on or about August 30, 1991. See Defendants' Reply, filed May 26, 1992, pp. 11-12, n. 9. On November 8, 1991, Judge Carrigan of the Federal District Court ordered the Respondents in Mr. Gagan's habeas case to complete the record by supplying various transcripts from the state court. Complaint, ¶26. In January of 1992, the Respondents, through Ms. Ritz, asked Judge Carrigan to reconsider his order to complete the record, asserting that the additional transcripts requested by Mr. Gagan should not be considered in the federal habeas case. Exhibit G to

the Complaint. As noted above, all of the transcripts requested by Mr. Gagan were later prepared and filed in the federal court.

The essence of Mr. Gagan's Complaint is that Ms. Ritz told court reporters Kathleen Heymans and Janice Hibbard, who were responsible for preparing some of the transcripts Mr. Gagan had requested, not to prepare the transcripts. According to Mr. Gagan, Ms. Ritz knew of the state court's order for preparation of transcripts yet, beginning in June of 1991, Ms. Ritz told Ms. Hibbard and Ms. Heymans not to prepare the transcripts. Mr. Gagan also alleges that Gale Norton was personally involved in, and personally approved of, Ms. Ritz's alleged efforts to delay or prevent the preparation of the transcripts.

Ms. Ritz states that she did not know of the state court's order for preparation of the transcripts until March of 1992 and did not speak to any of the court reporters involved in Mr. Gagan's case until after Judge Carrigan entered his November 8, 1991 order to complete the record. Ritz Affidavit, Exhibit 1 to Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss (Ritz Affidavit). According to Ms. Ritz, she did talk with two court reporters shortly after Judge Carrigan's November 8 order. Ritz Affidavit. Ms. Ritz says she told reporter Janice Hibbard that the respondents in the federal habeas case were going to ask the court to reconsider its order requiring production of the transcripts and asked Ms. Hibbard to wait to transcribe the hearings until this issue was resolved. Ritz Affidavit. Ms. Ritz says she did not know of the state court's order until a judge of the Arapahoe County District Court called her in March, 1992, after the judge had been told by court reporter Janice Hibbard that Ms. Ritz had asked Ms. Hibbard not to prepare the transcripts. Ms. Ritz then withdrew the motion for reconsideration filed in Judge Carrigan's court. Ritz affidavit.

After Defendants filed affidavits executed by Ms. Hibbard and Ms. Heymans in support of the Defendants' Motion to Dismiss, Mr. Gagan filed motions to add Ms. Hibbard and Ms. Heymans as defendants in this action. Mr. Gagan alleges

that these court reporters were involved with Ms. Ritz and Ms. Norton in a scheme to deprive Mr. Gagan of the transcripts he needed to successfully prosecute his federal habeas case and his state post-conviction relief motion. According to Mr. Gagan, the final portions of the transcripts he had requested were transcribed and filed only after he had moved to add Ms. Hibbard and Ms. Heymans as defendants in this action.

For the purposes of this recommendation, it is assumed that Mr. Gagan's version of the facts is correct. Thus, it is assumed that Ms. Ritz knew of the state court's order for preparation of the transcripts shortly after it was entered and that, beginning in June of 1991, Ms. Ritz asked court reporters Janice Hibbard and Kathleen Heymans not to prepare or to delay the preparation of certain transcripts.

II. IMMUNITY OF ATTORNEY GENERAL

The United States Supreme Court has held that prosecutors are absolutely immune for activities intimately associated with the judicial process, such as the initiation and prosecution of a criminal case. *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). *See Snell v. Tunnell,* 920 F.2d 673 (10th Cir. 1990) *cert. denied,* U.S. , 111 S. Ct. 1622 (1991). The United States Court of Appeals for the Tenth Circuit has held that absolute prosecutorial immunity also protects state attorneys pursuing civil proceedings on behalf of the state. *Pfeiffer v. Hartford Fire Insurance Co.,* 929 F.2d 1484 (10th Cir. 1991). Prosecutorial immunity is applicable even if it leaves "the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler,* 424 U.S. at 427. *See also Campbell v. Maine,* 787 F.2d 776, 778 (lst Cir. 1986) (no bad faith exception to absolute immunity of prosecutor).

In the present case, Mr. Gagan alleges that Ms. Norton and Ms. Ritz attempted to delay or prevent the preparation of transcripts in an effort to impede or defeat Mr. Gagan's efforts to

secure federal habeas corpus relief and possibly state post-conviction relief. Even if these allegations are true, the absolute immunity rule of *Imbler* and *Pfeiffer* protects Ms. Norton and Ms. Ritz.

At the time Ms. Ritz is alleged to have told the court reporters not to prepare the transcripts, Ms. Ritz was the attorney of record for the state of Colorado in Mr. Gagan's federal habeas corpus action. When Mr. Gagan asked the state court to order preparation of the transcripts, the federal habeas case was the only pending action to which the transcripts might have been relevant. Mr. Gagan's motion for preparation of the transcripts refers repeatedly to his need for the transcripts in the federal habeas proceeding, and mentions only obliquely the possibility of seeking postconviction relief in the state court.

There is no question that the preparation of the transcripts was directly related to the federal habeas case. The fact that the transcripts in question had not been part of the record in Mr. Gagan's state court appeal does raise some question as to whether the transcripts could properly be considered in a federal habeas action. *See Rose v. Lundy,* 455 U.S. 509 (1982) (federal habeas court should not consider claims unless state courts have had an opportunity to consider same claims). Thus, for the purpose of the federal habeas action, there was a legitimate question of whether the transcripts needed to be prepared. In such circumstances, it is common for attorneys to work with court reporters to coordinate when, or whether, transcripts should be prepared. Ms. Norton's and Ms. Ritz's alleged actions with regard to the transcripts, whether proper or not, were intimately associated with their roles as advocates for the state of Colorado in the federal habeas case. Thus, absolute immunity protects Ms. Norton and Ms. Ritz from liability for money damages based on these actions.

III. IMMUNITY OF COURT REPORTERS

Mr. Gagan has filed motions to add two court reporters as defendants in this action. These reporters, Janice Heymans and Kathleen Hibbard, were involved in preparing some of the transcripts requested by Mr. Gagan. Mr. Gagan has alleged that Ms. Heymans and Ms. Hibbard intentionally delayed or tried to prevent the preparation of certain transcripts, at the request of Ms. Ritz. Mr. Gagan alleges that these actions caused substantial delays in his effort to obtain post-conviction relief in the state court and habeas corpus relief in the federal court. Mr. Gagan also alleges that Ms. Heymans and Ms. Hibbard filed misleading and/or false affidavits, again at the request of Ms. Ritz or her counsel, in Mr. Gagan's federal habeas corpus case and in the present case.

Court employees are protected by quasi-judicial immunity for actions they take at the behest of a judge. *See e.g. Valdez v. City and County of Denver,* 878 F.2d 1285, 1287-89 (10th Cir. 1989). In the present case, Mr. Gagan alleges that Ms. Heymans and Ms. Hibbard delayed in preparing transcripts in his case despite the fact that a state court judge had ordered that the transcripts be prepared. The federal circuits are split on whether quasi-judicial immunity extends to the actions of court employees which are within the scope of their duties but not based on the specific direction of a judge. *See e.g. Antoine v. Byers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991), *cert. denied,* U.S. , 113 S. Ct. 320 (1992) (court reporter who failed to prepare transcripts despite repeated court orders to do so protected by quasi-judicial immunity; reporter's actions were part of court's adjudicatory function); *Rogers v. Bruntrager,* 841 F.2d 853 (8th Cir. 1988) (clerks have absolute immunity for actions they are specifically required to do under court order or at judge's direction; only qualified immunity for all other actions). The Tenth Circuit has not ruled on the issue of whether quasi-judicial immunity protects acts of court reporters related to the preparation of a transcript or the acts of court employees which are within the scope of their duties but not based on the specific

direction of a judge. Assuming Mr. Gagan's allegations to be true, the magistrate judge finds that Ms. Heymans and Ms. Hibbard are protected by absolute immunity.

The United States Courts of Appeal for the Seventh and Ninth Circuits have both held that absolute immunity protects court reporters against law suits alleging that they wrongfully altered a transcript or delayed in preparing a transcript. *Scruggs v. Mollering,* 870 F.2d 376 (7th Cir.), *cert. denied,* 493 U.S. 956 (1989) (judicial personnel who perfom nonmechanical functions integral to the judicial process absolutely immune from damages lability for acts performed in the discharge of those functions; court reporters alleged to have falsified transcript); *Dieu v. Norton,* 411 F.2d 761 (7th Cir. 1969) (absolute immunity shields court reporter from suit alleging that reporter deprived plaintiff of a transcript; actions at issue involved reporter's official responsibilities); *Antoine v. Beyers & Anderson, Inc.,* 950 F.2d 1471 (9th Cir. 1991), *cert. denied,* U.S. , 113 S. Ct. 320 (1992) (court reporter who failed to produce transcript for three years, despite several court orders, protected by absolute immunity; court reporting part of adjudicatory function). The Fifth and Eighth Circuits have held that court reporters are protected by qualified immunity. *Slavin v. Curry,* 574 F.2d 1256 (5th Cir. 1978), *modified,* 583 F.2d 779 (alteration of transcript); *Holt v. Dunn,* 741 F.2d 169 (8th Cir. 1984) (delay in preparation of transcript).

The Tenth Circuit has held that the activities of a court employee which are intimately associated with the judicial process are protected by absolute immunity. *Tripati v. United States I.N.S.,* 784 F.2d 345 (10th Cir. 1986), *cert. denied,* 484 U.S. 1028 (1988). In *Tripati* the court held that probation officer is protected by absolute immunity for actions taken in the course of preparing and submitting a presentence report to a judge. The court concluded that the selection of an appropriate sentence in a criminal case is an important part of the judicial process and probation officers who assist in these determinations play critical roles in the process. Similarly, the actions of a court reporter in

preparing a record for review by another court are also critical to the judicial process. Review of the actions of a trial court is usually impossible without a transcript of the proceedings prepared by a court reporter. Appellate or collateral review of both civil and criminal cases is an important part of the judicial process and court reporters are indispensable to that process. Therefore, the rationale of *Tripati* applies to the present case as well.

A variety of other factors have been cited as relevant in considering whether absolute immunity is applicable to a particular situation. In *Cleavinger v. Saxner,* 474 U.S. 193 (1985), the Supreme Court noted several such factors:

> "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal."

Id., p. 202. The Tenth Circuit has summarized these considerations as balancing the right of citizens to seek redress for wrongs committed by government officials versus the need for such officials to be free from the prospect of being called to defend themselves against suits for acts done in the course of their duties. *G.M. Leasing Corp. v. U.S.,* 560 F.2d 1011, 1013 (10th Cir. 1977), *cert. denied,* 435 U.S. 923 (1978).

In the present case, an examination of these factors weighs in favor of the application of absolute immunity. First, there is a need to assure that court reporters can perform their functions without harassment and intimidation. As has been noted many times, the adversary nature of a trial presents a significant danger that dissatisfied litigants will vent their wrath on clerks, court reporters and other court employees. *See e.g. Scruggs v. Mollering,* 870 F.2d 376, 377 (7th Cir.), *cert. denied,* 493 U.S. 956 (1989).

Although some such suits have merit, many others would likely be nothing more than an expression of a litigants frustration. In the case of court reporters, such suits would sap the time and resources of court reporters while impeding their ability to perform their primary duty.

Second, there are a variety of safeguards which serve to control improper conduct by court reporters and ensure that errors can be corrected on appellate collateral review, despite problems obtaining a trial court record from a court reporter. In the present case, safeguards in state trial court and appellate court procedures and safeguards in federal habeas corpus procedure are most relevant because these are the procedures Mr. Gagan sought to use to correct alleged errors at his criminal trial. A trial judge has the power to order production of a transcript and to set deadlines for preparation of transcripts. Failure to comply with such an order puts a court reporter at risk of loss of employment and being cited for contempt of court. A court reporter is also subject to a suit for injunctive relief concerning the preparation of a transcript. *See Pulliam v. Allen,* 466 U.S. 522 (1984). For the purpose of a hearing under Rule 35(c) of the Colorado Rules of Criminal Procedure, the rule permits the introduction of evidence to supplement or substitute for the trial court record at a Rule 35(c) hearing. On appeal, the trial court record may be reconstructed, through the use of a substitute reporter or other means, under Rule 10(c) & (d) of the Colorado Appellate Rules. If reconstruction of the record is inadequate, then reversal and remand for a new trial is required. *People v. Killpack,* 793 P.2d 642 (Colo. App. 1990).

In a habeas corpus action concerning a state criminal conviction, a petitioner may obtain an order from the federal court requiring preparation of a transcript, as was done in this case. Rule 5, Rules Governing Section 2254 Cases in the United States District Courts (Habeas Corpus Rules). If a transcript, or a portion thereof, is unavailable, the petitioner may rely on a narrative summary of the evidence. Rule 4, Habeas Corpus

Rules. In the alternative, when the missing record concerns factual issues related to the petitioner's claims, the petitioner may generally object to the use of substituted records and insist on a hearing. *See Townsend v. Sain,* 372 U.S. 293, 318-19 (1963), *overruled on other grounds by Keeny v. Tamayo-Reyes,* U.S. , 112 S.Ct. 1715, 1717 (1992); *United States v. Butt,* 731 F.2d 75, 77 (1st Cir. 1984); *Little Light v. Crist,* 649 F.2d 682, 686 (9th Cir. 1981).

Finally, it should be noted that the allegations of Mr. Gagan's Complaint present a circumstance in which the Defendants who allegedly directed the effort to delay and/or deny transcripts to Mr. Gagan, Ms. Norton and Ms. Ritz, are clearly protected by absolute immunity. It would be quite unfair to deny the same protection to the court reporters who allegedly followed the attorneys' directions. *See Valdez v. City and County of Denver,* 878 F.2d 1285 (10th Cir. 1989) (unfair to give judges who issue orders protection of absolute immunity while denying same protection to court officers who obey those orders).

The factors discussed above weigh in favor of absolute immunity for court reporters with regard to their actions in preparing a court record. A court reporter's actions in preparing a court record for review on appeal or in other post-conviction proceedings are activities intimately related to the judicial process and therefore entitled to the protection of absolute immunity. The other safeguards discussed above provide a variety of means to resolve problems with trial court records short of damages suits against court reporters. The other factors mentioned by the *Cleavinger* but not discussed above, insulation from political influence and the importance of precedent, carry little weight in this particular situation. In this case, absolute immunity prevents Mr. Gagan from obtaining monetary relief for what he claims are intentional wrongs by government officers. This is the result of the less than perfect balance which must be struck in applying absolute immunity; a balance described well by Judge Learned Hand: "In this instance is has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the

constant dread of retaliation." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).

IT IS THEREFORE RECOMMENDED that Defendants' motion to dismiss be granted and Plaintiff Cary Gagan's Complaint be dismissed. IT IS FURTHER RECOMMENDED that Mr. Gagan's motions to add court reporters Janice Hibbard and Kathleen Heymans as defendants be denied.

FURTHER, IT IS ORDERED that under Rules 603 and 605 of the Local Rules of Practice of the United States District Court for the District of Colorado, the parties shall have ten (10) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. FED. R. CIV. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz,* 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn,* 474 U.S. 140, 155 (1985); *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n.* 793 F.2d 1159, 1164 (10th Cir. 1986).

DATED this 5 day of February, 1993.

BY THE COURT:

/s/ O. EDWARD SCHLATTER

O. EDWARD SCHLATTER
United States Magistrate Judge

Case No. 92-Z-655

CERTIFICATE OF MAILING:

I certify that I have duly mailed a copy of the foregoing Order and Recommendation of United States Magistrate to the following:

Cary James Gagan
3000 East Colfax, #272
Denver, CO 80222

David R. Brougham, Esq.
LaDonne Bush, Esq.
1200 Seventeenth Street
Suite 1700
Denver, CO 80202

Dated: February 5, 1993

/s/ LAURA SCHRAEDER

Secretary to Magistrate
Judge Schlatter

APPENDIX D

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO

Case No. 86 CR 451, Division 11

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

v.

CARY GAGAN,

Defendant.

ORDER

This matter is before the Court on the letter of Chief Judge Kenneth K. Stuart to Mr. Cary James Gagan dated March 19, 1992, and the letter with attachments from Cary James Gagan to Chief Judge Stuart dated March 16, 1992. The Court has thoroughly reviewed the file in this case, has spoken with two court reporters (out of four court reporters) involved in these matters, two court reporters having been unavailable by telephone over the last day and one-half, and to Wendy Ritz, Assistant Attorney General. Based on this review the Court finds as follows:

On or about March 22, 1991, Chief Judge Steinhardt issued an order granting Mr. Gagan's motion for preparation of transcripts at State expense. Transcripts of court proceedings, if there were any, were ordered to be prepared for the following dates in cases 86CR451 and 86CR539:

July 22, 1987
July 24, 1987
July 27, 1987
August 31, 1987
September 15, 1987
September 18, 1987
October 2, 1987
October 5, 1987
November 13, 1987
December 21, 1987
December 30, 1987
February 8, 1988
February 9, 1988
February 25, 1988
February 29, 1988
March 1, 1988
May 18, 1988

By April 1, 1991, lead court reporter, Rosemary DeMartini was contacted to prepare transcripts and she in turn, upon information and belief contacted reporters Janice Hibbard, Jennifer Mastalka and Kathleen Heymans, to transcribe notes of theirs. By letter dated April 1, 1991, Gregory C. Langham, District Administrator 18th Judicial District, so notified Mr. Gagan. By letter dated April 11, 1991, Ms. DeMartini informed Mr. Gagan, with copies to relevant court reporters, that preparation of transcripts was under way and anticipated completion date was July 1, 1991. Kathleen Heymans has in fact completed her transcript, and an affidavit that on one requested date there was not in court proceeding on these cases. The other transcripts have not been prepared.

This Judge was informed by court reporter Janice Hibbard on March 23, 1992, that she stood ready, willing and able to transcribe these proceedings and had already pulled her notes to do so, but that she had been instructed by Assistant Attorney General Wendy Ritz not to comply with Chief Judge Steinhardt's order and instructed not to prepare the transcripts. In a telephone conversation between this Judge and Ms. Ritz on March 24, 1992, Ms. Ritz confirmed this; to wit, that she did not think these transcripts were necessary and that she instructed the court reporter not to prepare court ordered transcripts. She never notified this Court of her instructions and this Court was under the impression that transcripts were being prepared.

Ms. Ritz unilaterally countermanded a District Court order. Her conduct is quite frankly outrageous. This Court knows of no authority for such action. This Court so informed Ms. Ritz. She was further informed never to proceed in such a fashion again.

If Ms. Ritz disagrees with a court order, there are formal means to present this to the Court, or to a higher Court, for consideration instead of ignoring a Court order and telling others to also ignore that order. Even if Ms. Ritz does no believe these transcripts are necessary for federal proceedings,

Mr. Gagan has ongoing proceedings in this case and Ms. Ritz has affected these proceedings.

In addition, by order of November 8, 1991, Judge Carrigan *ordered* that certain transcripts be prepared which Ms. Ritz had previously told the court reporters not to prepare. Although she clearly knew of Judge Carrigan's order, upon information and belief, she never recontacted the reporters to inform them that they were now under two court orders to prepare these transcripts.

It is hereby ordered that Ms. Ritz cease and desist from further interference or countermanding of orders of the District Court, Arapahoe County; that Court reporters Rosemary DeMartini, Janice Hibbard and Jennifer Mastalka prepare transcripts of the proceedings in this case on the dates listed above and file them with the Arapahoe District Court within 30 days. This Court will transmit the transcripts to federal court as needed and will make use of the transcripts in this case as appropriate.

DONE and signed in open court this 25th day of March, 1992.

BY THE COURT

/s/ DEANNA E. HICKMAN

DEANNA E. HICKMAN
District Court Judge

APPENDIX E

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO

Case No. 86 CR 451 and 86 CR 539, Division 11

ORDER

PEOPLE OF THE STATE OF COLORADO,

Plaintiffs,

v.

CARY GAGAN,

Defendant.

This matter is before the Court on a Motion to Reconsider. The Court has reviewed the Motion and the response filed by Mr. Gagan. Although the Motion contained no affidavits, the response filed by Mr. Gagan contained affidavits from Ms. Ritz and Ms. Hibbard. The information in the affidavits was not communicated to this Court by either affiant. At no time did they tell this Court that they were unaware of Judge Steinhardt's order. However, in light of their statement that they were unaware of Judge Steinhardt's order, the Court will withdraw its opinion in part. All of the order will be withdrawn except that portion ordering transcripts prepared within 30 days. Three transcripts are still outstanding from Judge Steinhardt's order to wit:

In one or more of these cases 86DR451, 86CR539, 87CR1477 on dates July 24, 1987, October 2, 1987, October 5, 1987.

Upon information and belief Janice Hibbard was the court reporter on some of these dates. The transcript clerk informs me these still have not been prepared. These transcripts shall be prepared within 30 days.

DONE and signed in open court this 1st day of June, 1992.

BY THE COURT:

/s/ DEANNA E. HICKMAN

DEANNA E. HICKMAN
District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER AND ATTORNEY GENERAL
FOR THE STATE OF COLORADO

Respondents.

ORDER

Upon consideration of Petitioner's Motion to Complete the Record,

IT IS ORDERED that Respondents complete the record by supplying the following:

1. In Cases 86-CR-539 and 86-CR-451,
   a. Pages 174-179, Volume 14;
   b. Transcript of July 22, 1987 hearing (in chambers);
   c. Transcript of July 24, 1987 hearing;
   d. Transcript of September 15, 1987 hearing (bail);
   e. Transcript of September 18, 1987 hearing (writ);
   f. Transcript of November 13, 1987 hearing (extradition); and
2. In Case No. 87-CR-1477,
   a. Transcript of October 5, 1987 hearing in 87-CV-1477.

IT IS SO ORDERED.

Dated this 8th day of November, 1991.

BY THE COURT:

/s/ JIM R. CARRIGAN

JIM R. CARRIGAN
U. S. District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-655

CARY JAMES GAGAN,

Plaintiff,

vs.

GALE NORTON, in her individual capacity as Attorney General for the State of Colorado; and
WENDY RITZ, in her individual capacity as Assistant Attorney General for the State of Colorado,

Defendants.

AFFIDAVIT OF WENDY J. RITZ

I Wendy J. Ritz, having been duly sworn, state as follows:

1. I am an Assistant Attorney General for the State of Colorado.

2. In February of 1988, Cary James Gagan was convicted in the District Court of Arapahoe County on two counts of theft, two counts of criminal attempt to commit theft, and two counts of criminal impersonation. Mr. Gagan was sentenced to four years on count one and eight years on each of the other counts, to be served concurrently.

3. When Mr. Gagan appealed his state court conviction, I represented the People of the State of Colorado in the appeal. The Colorado Court of Appeals affirmed the judgment of conviction in *People v. Gagan,* No. 88CA0916, 88CA0982 (Colo. App. May 24, 1990) (not selected for official publication), *cert. denied,* November 13, 1990.

4. I have not spoken to Gale Norton about Mr. Gagan's appeal.

5. On January 7, 1991, Mr. Gagan filed a petition for writ of habeas corpus in the United States District Court for the District of Colorado (Civil Action No. 91-C-0005) naming Frank Gunter and the Attorney General of the State of Colorado as respondents. On behalf of the respondents, I filed an answer to show cause in the United States District Court on February 11, 1991.

6. On March 4, 1991, United States Magistrate Richard Borchers ordered the Clerk of the District Court of Arapahoe County to file the state trial court record with the Clerk of the United States District in Civil Action No. 91-C-0005.

7. In March 1991, Mr. Gagan filed his pro se "Motion for Preparation of Transcripts at State Expense" in the Arapahoe County District Court in Case Nos. 86CR539/86CR451. The Motion states in part:

> That the below requested transcripts involve proceedings in the above cases, and that these proceedings involve issues related to the speedy trial claims being reviewed by the United States District Court For the District of Colorado in Civil Action No. 91-C-0005.

Mr. Gagan's Motion is attached as Exhibit B to his "Complaint 42 U.S.C. 1983", and the quoted language appears on page 1.

8. Mr. Gagan sent me a copy of his March 1991 motion when he filed it. I then sent a copy of the motion to the Arapahoe County District Attorney's Office because the District Attorney's Office represents the interests of the People at the state trial court level. The Attorney General's office was not a party to the proceedings in Arapahoe County, and I did not receive any notice from the District Court regarding any action taken on Mr. Gagan's motion.

9. On May 10, 1991, the Federal Public Defender's office was appointed to represent Mr. Gagan in Civil Action No. 91-C-0005.

10. On November 7, 1991, Mr. Gagan by his counsel, Vicki Mandell-King (an Assistant Federal Public Defender), filed a "Motion to Complete Record" in Civil Action No. 91-C-0005, which indicated that transcripts from several proceedings had not been included in the state court record transmitted to the United States District Court.

11. By Order entered on November 8, 1991, Judge Jim R. Carrigan ordered the respondents in Civil Action No. 91-C-0005 to complete the record by supplying various transcripts.

12. I did not have any communications with any court reporters about the transcripts requested by Mr. Gagan until after I received Judge Carrigan's Order.

13. After receiving Judge Carrigan's Order, I contacted the Clerk of the Arapahoe County District Court and the Arapahoe County District Attorney's Office to determine if the requested transcripts existed. No one in either office informed me that there was an existing state court order to prepare the transcripts.

JAN 27 1995

No. 94-1076

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CARY JAMES GAGAN
Pro Se

United States Post Office
General Delivery
Cherry Creek Station
Denver, Colorado 80206
(303) 832-4091

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether an Assistant Attorney General for the State of Colorado is entitled to absolute prosecutorial immunity for conduct undertaken as an advocate on behalf of the State in a habeas corpus proceeding.

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28 U.S.C. 2254.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissable in the Federal court proceeding.

Rule 5 Governing Section 2254 Cases. Answer; contents

The answer shall respond to the allegations of the petition. ...The answer shall indicate what transcripts (of pre-trial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded and not transcribed...The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished...

In addition to the mandatory imposition which attaches to the State, Rule 5 accords discretionary authority to the district court to order such identification and presentation if warranted by the circumstances of the situation...

Rule 35 of the Colorado Rules of Criminal Procedure, C.R.S. 1988

(a) Correction of Illegal Sentence

(b) Reduction of Sentence

(c) Other Remedies

(2) Notwithstanding the fact that no review of a conviction of crime was sought by appeal within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the grounds hereinafter set forth. Such an application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

I. That the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the Constitution or laws of this state;

III. That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

VI. Any grounds otherwise properly the basis for collateral attack upon a criminal judgment.

28 U.S.C. 753(b)

.....The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of the court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of the court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

Section 13-5-127, C.R.S. 1988 Repl. Vol. 6A. Duties of Reporters. The shorthand reporter, on direction of the court, shall take down in shorthand all the testimony, rulings of the court, exceptions taken, oral instructions given, and other proceedings had during the course of trial of any cause, and in such causes as the court may designate.[1]

Section 24-31-101, C.R.S. 1986 Repl. Vol. 10A. Powers and duties of Attorney General.

(1)(a) The attorney general of the state shall be the legal counsel and advisor of each department, division, board, bureau, and agency of the state government other than the legislative branch. He shall attend in person at the seat of government during the session of the general assembly and term of the supreme court and shall appeal for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested.

(f)(3) The attorney general may appoint such deputies and assistants as are necessary for the efficient operation of his office within the limitations of appropriations made therefor by the general assembly.

Section(s) 20-1-102 and 20-1-201, C.R.S. 1986 Repl. Vol. 8B. District Attorneys...Appear on behalf of state and counties...Deputies-chief deputies-staff.

C.R.S. 20-1-102...

(1) Every district attorney shall appear in behalf of the state and the several counties of his district:

(a) In all indictments, actions, and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof or any county of his district may be a party.

C.R.S. 20-1-201...

(c) The district attorney in every judicial district is authorized to appoint such special deputy district attorneys as he deems necessary to properly discharge the duties of his office, and such special

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1/ The Colorado Supreme Court in Jones v. District Court, 780 P.2d 526 (Colo. 1989)(quoting Keady v. Owens, 30 Colo. 1, 69 P. 509 (1902)), has addressed the duties of court reporters (C.R.S. 13-5-127) and in regards thereto, stated in part: "a court reporter has a sworn duty to provide a transcript of the record to the party requesting it, and the order of the judge of the court not to furnish it is of no excuse or justification whatever". Jones, 780 P.2d at 529.

shall hold their offices during the pleasure of such district attorney.....such special deputies shall only be appointed from among those persons holding office as attorney general, deputy attorney general....[2]

COLORADO CONSTITUTION
(Relevant Provisions)

ARTICLE II, SECTION 25.

Section 25. Due Process of Law. No person shall be deprived of life, liberty or property, without due process of law.[3]

2/ The Office of the District Attorney represents the People at the trial court level; except when ordered by the governor and/or appointed (as a special deputy district attorney) by the District Attorney, the Attorney General and/or an Assistant Attorney General has no lawful authority at the state trial court level.

3/ Although the Colorado Constitution does not contain an identical provision to that of the Fourteenth Amendment to the United States Constitution, that declares that no state shall deny a person equal protection of the laws, it is well-established that a like guarantee exists within the Colorado constitution's due process clause of Art. II, Sec. 25, and that its substantive application is the same insofar as equal protection analysis is concerned. E.g. Lujan v. Colorado State Bd. of Educ., Colo. 649 P.2d 1005.

STATEMENT OF THE CASE

Petitioner's ("Ritz") factual assertions in her statement of the case fails to make reference to the indisputable fact that the alleged "countermanding" by Ritz of three state court orders and one federal court order for court reporters to produce this Respondent's trial transcripts was accomplished solely as a result of this Respondent's status as an indigent defendant-petitioner.[4]

As a result of the Respondent's indigency court orders were required for the sole purpose of having the State pay the Reporters for producing the Respondent's trial transcripts. In opposite, if Respondent a "wealthy" defendant-petitioner these court orders (for these Reporters to produce Respondent's transcripts) would not have been a prerequisite, as the Respondent himself making the financial arrangements with the Reporters to produce the trial transcripts... and Ritz, as an assistant attorney general, then not being provided the opportunity to (allegedly) countermand these court orders that per state and federal statutes required the Reporters to produce and/ or comply in good faith with the court's orders to produce Respondent's trial transcripts.

The main thrust of the petitioner's statement of the case is that Ritz, as an assistant attorney general representing the State in the federal habeas corpus proceeding, was never advised (until March 24, 1992) of Judge Joyce C. Steinhardt's state court order

---

4/ The record in the Tenth Circuit Court of Appeals confirming this issue presented by this Respondent in his briefs and considered by the Tenth Circuit in rendering its decision.

of March 22, 1991 that ordered the Reporters to produce this Respondent's trial transcripts. Petition, pp. 2,3,4 and 5. This is not the case. Being that Ritz was not a party to the Respondent's state court post-conviction proceedings, Judge Steinhardt, this Respondent or any other state court representative under no legal obligation to serve on Ritz any formal notice of either the Respondent's motion for transcripts and Judge Steinhardt's order granting the motion and ordering the Reporters to produce the transcripts.

Yet, in regards to the Respondent's (exhausted) speedy trial claim in the federal habeas corpus proceeding, these non-transcribed transcripts were also relevant and/or supportive of Respondent's arguments of speedy trial violations. Accordingly, Respondent served on Ritz copies of the motion for preparation of transcripts at state expense (April 3, 1991) and court documentation from the state court that advised Ritz of Judge Steinhardt's state court order (April 16, 1991).[5]

Petitioner's factual assertions in the statement of the case also fails to inform this Court that the record in the Tenth Circuit Court of Appeals confirms that the Reporters failed to comply with the court ordered deadline(s) to file Respondent's trial transcripts ordered by state court judge Deanna Hickman. Petition, Appendix D.

5/ The record of the district court and appellate record contain evidence that the Office of the Attorney General (Ritz) acknowledged receipt of the motion for transcripts and the court documentation from the state court advising Ritz of the state court order issued by Judge Steinhardt for the Reporters to produce Respondent's trial transcripts. In addition, the record below confirming that Ritz was also advised of Judge Steinhardt's order on May 16, 1991, July 19, 1991, and February 13, 1992.

Judge Hickman ordering on March 25, 1992 that the remaining transcripts be filed within 30 days of the order. The record below showing that the transcripts not filed by the Reporters until July 24, 1992, and the record below confirming that this Respondent alleging that Ritz now "countermanded" Judge Hickman's order of March 25, 1992, and alleging that Ritz had continued to instruct the Reporters to delay the filing of Respondent's transcripts.[6]

Petitioner also includes within her statement of the case, portions of the recommendation of United States Magistrate Judge O. Edward Schlatter and a portion of the order of dismissal entered by Judge Zita L. Weinshienk. Petition, pp. 6,7. These opinions of Magistrate Judge Schlatter and Judge Weinshienk, on the whole, suggesting that these "non-transcribed" transcripts ordered produced by the state trial court could not be considered by the federal habeas court in regards the Respondent's federal habeas action. As stated under Rule 5 Governing Section 2254 Cases, "the court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished..." (emphasis supplied). Thus, it is without question these non-transcribed transcripts could be considered by the federal court in regards to Respondent's (exhausted) speedy trial claim.[7]

6/ Not until July 20, 1992 did Reporter Heymans transcribe her notes of the court ordered (4 times) transcript of October 5, 1987. And this act by Reporter Heymans coming several hours after this Respondent, in the civil rights action, had filed and served on Ritz's counsel a motion to amend complaint and add Reporter Heymans as a defendant.

7/ Respondent not raising any new claims in the federal habeas case; Respondent requesting the federal court review the non-transcribed transcripts in regards to the exhausted speedy trial claim.

Moreover, Petitioner's factual assertions fail to point out to this Court is that only when the Reporters had not (by November 1991) filed the transcripts that were to be filed on or about July 1, 1991, did the Respondent file in the federal habeas case a motion to complete the record (November 7, 1991). The Reporters had not sought any extensions of time and had refused to reply to the Respondent's repeated attempts to assertain the reason(s) for the delay in filing the transcripts.[8] Accordingly, having exhausted his state remedies in regards to obtaining specific trial transcripts, the federal court on November 8, 1991 issued its order to Ritz to have the Reporters produce specific trial transcripts[9] to complete the record in the habeas case. Wade v. Wilson, 396 U.S. 282 (1968); Townsend v. Sain, 83 S.Ct. 745 (1963)(a district court sitting in habeas corpus clearly has the power to compel production of the complete state-court record).

Finally, Petitioner fails to inform this Court that the record below confirms that these transcripts were so pertinent to the Respondent's Crim. P. 35(c) motion to vacate judgment and sentence, a pro se motion filed by Respondent in the state trial court on

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8/ The record below confirming that when the Reporters had not complied with their own set deadline (to file the transcripts) of July 1, 1991, Respondent made attempts by correspondence and phone calls,directed to the Reporters between July-Oct.'91), to assertain the reason for the delay and when the transcripts would be filed. The Reporters never re-contacting Respondent.

9/ This order directing Ritz to have the Reporters produce the same transcripts that had been ordered produced by and through the state court order issued by Judge Steinhardt on March 22, 1991. Previously, on July 19, 1991, another Reporter (lead court reporter Rosemary DeMartini) had filed in the federal court transcripts ordered prepared and/or produced by Judge Steinhardt. Ritz not objecting to these less pertinent trial transcripts being made part of the habeas record.

August 30, 1991, counsel that had been appointed (Oct.'91) to this postconviction proceeding by Judge Steinhardt delaying the filing of a memorandum in support of Respondent's 35(c) claims, as well as delaying the setting of a hearing under Rule 35(c), until a review of these transcripts could take place by this counsel.[10] The record below confirming that the subsequent dismissal of the Respondent's Crim. P. 35(c) motion to vacate judgment and sentence the direct result of this alleged intentional transcript delay, and Ritz's alleged continued "countermanding" of state court orders for the Reporters to produce Respondent's trial transcripts.[11] In addition, counsel in the federal habeas corpus proceeding had had the federal court hold the habeas proceeding in abeyance pending a resolution of the Respondent's state postconviction proceedings. **(Exhibit A)**

10/ The 35(c) motion raising claims of: (1) denial of equal protection of the laws; (2) ineffective assistance of appellate counsel and trial counsel; (3) insufficient information/variance between allegations and proof; (4) sufficiency of evidence and; (5) illegal and void sentences. Respondent's appointed appellate counsel refusing to raise these claims on direct appeal and refusing to have these at issue transcripts designated for the record on appeal.

11/ Judge Deanna Hickman appointed to Respondent's postconviction matters upon the retirement of Judge Steinhardt on January 1, 1992. Prior to being appointed as a state district court judge, Judge Hickman Chief of the Trials Unit for the Office of the Attorney General of Colorado. Upon being advised that this Respondent had used Judge Hickman's fact finding (regarding the transcript delay) to file a civil rights suit against Attorney General Gale Norton and Assistant Attorney General Wendy Ritz, Judge Hickman withdrawing her order of March 25, 1992, then on August 19th and November 2, 1992, entering orders dismissing Respondent's Crim. P. 35(c) motion for a "failure by Respondent's counsel" to file a memorandum in support of Gagan's 35(c) claims...when this counsel had not had the opportunity to review the delayed transcripts until July 24, 1992 at the earliest.

Now in her statement of the case Ritz advances several legal arguments that in regards to her alleged actions (countermanding state and federal court orders for Reporters to produce trial transcripts for appeals), not only were these alleged actions "within the scope of her duties as an advocate in the federal habeas case", but these alleged actions were "intimately associated with the judicial process" and Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), extending absolute immunity to Ritz under these circumstances. Petition, pp. 8-12. Ritz is alleged to have "countermanded" two different state trial court orders that ordered court reporters to produce Respondent's trial transcripts. Ritz, under the circumstances of this case (no order from the Governor or appointment by the district attorney as special deputy district attorney), is without any colorable authority at the state trial court level and any alleged unlawful actions by Ritz at the state court level outside the scope of her duties as an advocate in the federal habeas corpus proceeding. Sec. 24-31-101 C.R.S. 1986 Repl. Vol. 10A; Sec. 20-1-201, C.R.S. 1986 Repl. Vol. 8B; **Snell** v. **Tunnell**, 920 F.2d 673 (10th Cir. 1990)(superseded discretionary authority of district attorney and absolute immunity not warranted).

In addition, being that Ritz's alleged unlawful actions are in regards to the production of Respondent's trial transcripts, these actions are not intimately associated with the judicial process and actions taken by Ritz in the role of a court reporter and absolute immunity not applicable in this case. **Antoine v. Byers & Anderson, Inc.**, 113 S.Ct. 2167 (1993)(court reporters job requires

no discretionary judgment, court reporters not entitled to absolute immunity as part of the judicial function); **Slavin v. Curry**, 574 F.2d 1256 (5th Cir. 1978)(prosecutorial function does not extend to supervision of trial transcript).

Finally, none of these alleged unlawful actions by Ritz could have occurred if this Respondent was not an indigent defendant-petitioner, as there would have been no court orders for Ritz to have allegedly countermanded if this Respondent a wealthy defendant-petitioner who would have been able to himself make the administrative and financial arrangements with the court reporters to produce for appellate purposes the Respondent's trial transcripts. Quite simply, Ritz would have never even been advised and/or informed of the production of the transcripts until Respondent filed such in the federal habeas corpus proceeding...then Ritz could argue in open court before a judge the legality of the transcripts in the federal habeas proceeding.[12] The contitutional guaranties of due process and equal protection assure Respondent the right to appellate review without invidious discrimination on account of Respondent's indigency. The Respondent's right to appeal from his conviction is the same as that of a person with financial means. **Griffin v. Illinois**, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; **Haines v. People**, 454 P.2d 595; Colo. Const. Art. II, Sec. 25; U.S.C.A. 14.

12/ It is axiomatic Ritz could not by any statute have opposed and/or interferred at the state trial court level in the postconviction proceedings; in the federal habeas corpus proceeding Ritz could only argue that 28 U.S.C. 2254 and Rule 5 Governing Section 2254 Cases did not provide the federal court the authority to consider these non-transcribed transcripts in regards to Respondent's exhausted speedy trial claim.

SUMMARY OF THE ARGUMENT

It is undisputed in the Colorado courts, and should be undisputed in this Court, that every person convicted of a crime is entitled as a matter of right to make application for post-conviction review alleging as this Respondent did in good faith, one or more of the grounds set forth under Rule 35(c)(2) of the Colorado Rules of Criminal Procedure. That determination by the Colorado legislative body cannot be disturbed by this Court. Further, it is well settled in this Court that when a State does grant as a matter of right this type of appellate review, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, as well as Article II, Section 25 of the Colorado Constitution, protect indigent persons like the Respondent from invidious discrimination during the course of a state and/or federal appeal.

The Colorado Attorney General's Office, the Petitioner, receive their power and duties from statutes alone and hold no common law powers. Under the circumstances of this case, Petitioner had no colorable authority at the state trial court level, and for this Court to extend absolute immunity to Petitioner for directing court reporters to violate their statutory duties and orders of court to (without discretion) produce Respondent's trial transcripts, would inevitably lead to authorized invidious discrimination by the State towards an indigent defendant-petitioner appealing his criminal conviction. The State, on the other hand, not being able to initiate these same procedures against a wealthy defendant-petitioner

appealing his criminal conviction.

A federal district court sitting in habeas corpus has the discretionary power to order the State to produce the non-transcribed portions of the state record for review of an exhausted speedy trial claim. The State, Petitioner here, and the court reporters have no discretion in producing these court ordered non-transcribed transcripts, with the prosecutorial function not extending to the supervision of the trial transcripts. Moreover, Petitioner was performing a reporter's function that did not require the exercise of discretionary judgment, and this ministerial and administrative task of producing a transcript not entitling Petitioner to immunity as part of the judicial function in the federal habeas corpus case. Since the decision of the Tenth Circuit Court of Appeals is in accord with this Court's sparing recognition of absolute immunity, extending it no further than its justification would warrant, this Court should not grant certiorari in this case.

ARGUMENT

I. PETITIONER'S ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW.

The Colorado legislative body has created as a matter of right a review of a person's criminal conviction under Rule 35 of the Colorado Rules of Criminal Procedure. And pursuant to specific Colorado statutes, C.R.S. 20-1-102(1)(a) and C.R.S. 20-1-201(c), it is the Office of the District Attorney who, in this case, represented the interests of the People of Colorado in the Respondent's Crim. P. 35 proceedings. The Office of the Attorney General re-

ceives their power and duties from statutes alone, C.R.S. 24-31-101, et seq., and under the circumstances of this case[13] the Office of the Attorney General was without any constitutional or statutory authority to allegedly countermand state court orders that required the court reporters to produce Respondent's trial transcripts.[14] **Jones v. District Court**, 780 P.2d at 529.(court reporter has a sworn duty to provide a transcript of the record to the party requesting it, and the order of the judge of the court not to produce it is of no excuse or justification whatever). The determination of Colorado law cannot be reviewed by this Court. **Jankovich v. Indiana Toll Road Commission**, 379 U.S. 487, 489 (1965). Given the breadth of Colorado laws as interpreted by the Colorado courts, in regards to decisions that the district attorney represents the interests of the People of Colorado in postconviction proceedings (**Tooley v. District Court In And For Second Judicial District**, Colo. 549 P.2d 775, citing **People v. District Court**, Colo. 549 P.2d 778), certiorari should not be granted by this Court to review these decisions.

Petitioner asserts that the Tenth Circuit's reasoning failed to address that as the advocate for the State of Colorado in the

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13/ In this case there was no order from the governor for Ritz to prosecute the Respondent's postconviction proceeding on behalf of the State; nor did the district attorney appoint Ritz as a special deputy district attorney in this matter.

14/ Below, Respondent alleged that Ritz countermanded Judge Steinhardt's order of March 22, 1991, then after Judge Hickman had issued other state court orders for the court reporters to produce Respondent's trial transcripts (3/25/92 and 6/01/92), the failure by the reporters to meet the court ordered deadlines was the result of Ritz's continual countermanding of this state court order.

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federal habeas corpus proceeding, Ritz's actions in regards to countermanding the state court orders for the court reporters to produce Respondent's transcripts, "were directed exclusively to the habeas corpus proceeding in her capacity as an advocate of the Office of the Attorney General for the State of Colorado", and the same considerations which underlie the extension of prosecutorial immunity to all other advocacy functions in criminal and civil proceedings of necessity extend to Ritz's advocacy function in the habeas corpus proceeding. Petition, pp. 10, 11.

The record below confirms that at the time of Respondent's motion for transcripts and Judge Steinhardt's order granting the motion and ordering the court reporters to produce Respondent's trial transcripts (March 1991), Respondent had pending before Judge Steinhardt two postconviction proceedings, a 35(b) and 35(c) proceeding for which these transcripts were applicable. In addition, Judge Steinhardt, who was totally familiar with Respondent's intentions of filing a Crim. P. 35(c) motion raising claims his appointed appellate counsel had refused to raise on direct appeal[15], also granted the motion for transcripts based upon its contents that these transcripts (non-transcribed) could be considered by the federal habeas court in regards to Respondent's exhausted speedy trial claim in the habeas corpus proceeding, and Respondent exhausting this transcript request in the state court. The request was made (for transcripts) as an adjunct to Respondent's substan-

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15/ Judge Steinhardt advised that Respondent, in his Crim. P. 35(c) motion to raise a claim of ineffective appellate counsel on direct appeal; appointed appellate counsel refusing to also have these at issue transcripts designated for the record on appeal.

allegations that demonstrated to Judge Steinhardt a need for these non-transcribed transcripts for review by the federal habeas court regarding Respondent's exhausted speedy trial habeas claim, as well as for the pending and proposed post-conviction proceedings in the state trial court. **Smith v. Bennett**, 365 U.S. 708 (1961)(having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial condition). See also Section 28 U.S.C. 2254(f) and Rule 5 Governing Section 2254 Cases.[16]

Even under the most generous interpretation of "advocacy", the Tenth Circuit Court of Appeals stated that"the actions at issue in this case are simply too far removed on the continuum from the core prosecutorial functions of initiating and pursuing criminal prosecutions to be covered by absolute immunity." Petition, Appendix A, pp. 4a, 5a. Stated alternatively, without any constitutional or statutory authority at the state trial court level, when allegedly countermanding state court orders for the reporters to produce Respondent's trial transcripts, Ritz was clearly acting outside the scope of her duties as an advocate for the Attorney General's Office in the federal habeas corpus proceeding and the progeny of **Imbler v. Pachtman**, 424 U.S. 409 (1976), not applicable in this case.

16/ Rule 5 sets forth the procedure for mechanically getting the record of the state court proceedings into the record of the federal habeas proceeding, while Section 2254(f) establishes the criteria for admissability in the federal court.

In the context of this case, Respondent was going to request the federal habeas court to consider the non-transcribed transcripts in regards to Respondent's exhausted speedy trial habeas claim. **Flamer v. Chaffinch**, 774 F.Supp. 211 (D.Del. 1991)(court on its own motion or upon request by petitioner may order that certain portions of the non-transcribed proceedings be transcribed and furnished). Even if the Respondent's speedy trial claim had not been exhausted and there was argument relating to this exhaustion issue, "state or district court must provide state records needed on exhaustion issue when pro se petitioner is unable to do so". **Duttry v. Petstock**, 878 F.2d 123, 124 (3d Cir. 1989).

Accordingly, Petitioner's argument that her advocacy function in the federal habeas proceeding superseded federal statutes and rules providing this Respondent the opportunity to have the federal court review the non-transcribed transcripts (that the federal court itself ordered produced) in regards to an exhausted speedy trial claim, is without any support at either the state court or federal court level.

II. IT IS UNDISPUTED BELOW AND IN THIS COURT AS WELL, THAT WHEN A STATE DOES GRANT AS A MATTER OF RIGHT A POSTCONVICTION REMEDY, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS INDIGENT PERSONS LIKE RESPONDENT FROM INVIDIOUS DISCRIMINATION IN THE APPELLATE PROCESS.

Petitioner cannot advance any meritorious argument that her alleged actions at issue here, the countermanding of state court orders for court reporters to produce Respondent's trial transcripts and disobeying a federal court order to have the court reporters

produce the non-transcribed transcripts to complete the record in the federal habeas corpus case, would have been accomplished if Respondent a "wealthy" defendant-petitioner instead of being indigent and unable to himself pay the reporters for producing the trial transcripts. Ritz could not have allegedly "countermanded" the state and federal court orders for the reporters to produce Respondent's trial transcipts if Respondent with the financial means to himself pay the court reporters to produce the transcripts...as in the case of a defendant-petitioner with the financial means to himself pay the reporters to produce trial transcripts, no court order is required. In the context of this case, as a result of Respondent's indigency, in order to have the State pay the reporters to produce the Respondent's trial transcripts, a court order was required and, in turn, Ritz provided the opportunity to discriminate against Respondent by allegedly "countermanding" state and federal court orders that required the reporters to produce Respondent's trial transcripts. This Court has repeatedly held "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." **Griffin v. Illinois**, 351 U.S. 12, 19, 100 L.Ed. 891, 76 S.Ct. 585. See also **Patterson v. Medberry**, 290 F.2d 275 (10th Cir. 1961). In **Bennett**, 365 U.S. at 709, 81 S.Ct. at 895, this Court stated:

> "To interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue his liberty is to deny that prisoner the equal protection of the laws."

Moreover, speaking for this Court in **Gardner v. California**,

393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969), Mr. Justice Douglas said:

> So long as this system of repeated hearings exists and so long as transcripts are available for preparation of appellate hearings in habeas corpus cases, they may not be furnished to those who can afford them and denied to those who are paupers.

Id., 393 U.S. at 369-370, 89 S.Ct. at 582-583.

Regarding the federal court order directed at Ritz to have the reporters produce the transcripts and complete the habeas record, the record below confirms Ritz "supervising" the production of the transcripts and producing only those transcripts she herself wanted filed in the federal habeas corpus proceeding. The other non-transcribed transcripts that the federal habeas court ordered produced[17] were the most pertinent and relevant transcripts in regards to the exhausted speedy trial claim in the habeas proceeding.[18] The record below also confirming that in regards to these transcripts Ritz did not produce as so ordered by the federal court, Respondent alleging that Ritz had instructed the court reporters to submit in the federal habeas proceeding false court documentation in regards to the actual scope of the record and the availability of specific transcripts. **(Exhibit B)** After stating in her

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17/ These same transcripts ordered produced by Judge Steinhardt's order of March 22, 1991; an order Ritz allegedly countermanded and instructed the reporters not to comply with Judge Steinhardt's order.

18/ Respondent's motion for transcripts specifically demonstrating exactly what transcripts were the most relevant to the speedy trial claims in the habeas case.

affidavit of January 6, 1992 that no hearings were held on the record on October 5, 1987, immediately after Respondent filed in the federal civil rights suit a motion to amend his complaint to add the court reporter as a defendant (July 20, 1992), the reporter transcribed her notes of this hearing held on October 5, 1987 on this same July 20, 1992 date. On August 4, 1992, this reporter then filing an affidavit stating these "clearly" marked notes had been in the possession of the other reporter. The other reporter having originally estimating the record for the 4 court hearings she was responsible as consisting of 300 pages of record and 120 days needed to transcribe her notes of these hearings. Yet after Judge Hickman's order of March 25, 1992, this reporter in 30 days filing 49 pages of transcripts regarding these 4 court hearings.[19] The record below showing that Respondent alleged Ritz instructed these court reporters to file and/or intentionally misrepresent to the federal court the actual availability of the transcripts, then after Judge Hickman's order of March 25, 1992, continuing to instruct the reporters to not comply with Judge Hickman's order.

The public interest demands strict adherence to judicial decrees, a federal court order directed to Ritz to have the reporters produce Respondent's trial transcripts, but a judicial decree Ritz blatently disregarded and allegedly requested the court reporters to the same. Ritz, as well as the court reporters had no discretion in "strictly" adhering to the federal court order to produce

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19/ These same transcripts ordered produced by Judge Steinhardt on March 22, 1991, with the record below indicating that this reporter agreeing to file such by July 1, 1991; Ritz alleged to have instructed this reporter not to produce these transcripts.

the Respondent's trial transcripts, and by failing to adhere to the court's order, Ritz cannot now claim absolute immunity for express dereliction of her duties as a court officer. **Valdez v. City And County Of Denver**, 878 F.2d 1285 (10th Cir. 1989). Because the decision of the Tenth Circuit Court of Appeals is in direct accord with all federal and state authority interpreting the right of an indigent to an appeal of his criminal conviction without invidious discrimination, certiorari should not be granted.[20]

III. A STATE ATTORNEY, WHEN PERFORMING THE FUNCTION OF A COURT REPORTER, IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

First, this Court in **Antoine v. Byers & Anderson**, 113 S.Ct. 2167 (1993), ruled that the production of the transcript is not the product of independent judgment and does not involve decision making discretion, with court reporters not entitled to absolute immunity as part of the judicial function, citing **Imbler v. Pachtman**, supra. In **Antoine** this Court stating that court reporting is an administrative task for which absolute immunity is not applicable, citing **Forrester v. White**, 484 U.S. 219 (1988). The Fifth Circuit in **Slavin v. Curry**, 574 F.2d at 1264-65, holding that the prosecutorial function does not extend to the supervision of the transcripts. Under 28 U.S.C. 753(b) the word "shall" is a mandatory

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20/ In **White By Swafford v. Gerbitz**, 860 F.2d at 661,n.4, the Sixth Circuit would not extend absolute immunity to a prosecutor who failed to act timely in securing the plaintiff's release after being ordered by the court to work out the details of his release. In the case cited by Petitioner as being most closely analogous to this case at issue here, **Webster v. Gibson**, 913 F.2d 510 (8th Cir. 1990), the prosecutor there "initiating and pursuing a criminal prosecution", as opposed to an appeal at the state and federal levels.

connotation and the antithesis of discretion or choice. Thus, if a court reporter has no discretion in producing a trial transcript, Ritz as the "other individual designated (by the federal court) to produce the record", had no discretion but to produce the Respondent's trial transcripts. Cf. **Burns v. Reed**, 500 U.S.____,____, 111 S.Ct. 1934, 1944, 114 L.Ed.2d 547 (1991): "Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice..." The court reporters cannot claim absolute immunity for a failure to produce a trial transcript, **Antoine v. Byers**, supra, so it is quite obvious that Ritz cannot claim absolute immunity when acting in the role of a reporter. **Buckley v. Fitzsimmons**, 113 S.Ct. 2606 (1993). In addition, no case authority would suggest that a prosecutor at common law enjoyed absolute immunity for the supervision of the trial transcript. The production of verbatim record of proceedings was not an ordinary part of the judicial process prior to 1871; court reporting became commonplace only in the twentieth century. Hence, if there was no common law tradition of immunity for stenographers, Ritz cannot begin to prove a common law tradition of absolute immunity for her actions regarding the supervision and/or the production of the Respondent's trial transcripts. To the contrary, court employees could be held liable for failure to provide timely transcripts. **E.g., Bates v. Foree**, 67 Ky. (4 Bush) 430 (1868) (clerk charged with providing transcript could be liable on bond).

Finally, Petitioner's affidavit filed in the federal civil rights suit, Petition, Appendix G, pp. 2g, 3g, contained other statements of material facts that subsequently were alleged by Respondent as being knowing false statements of material facts. Specifically, paragraphs 16, 19, and 23. **(Exhibit C)** Although Ritz's sworn statement that after her conversations with Reporter Heymans (Nov.'91/Judge Carrigan's Order), Reporter Heymans prepared a transcript of the hearing held in Division 11 on November 13, 1987, and she certified that she could find no record of any proceeding held on October 5, 1987 (para. no. 16), Reporter Heymans had actually prepared this November 13, 1987 transcript on June 14, 1991, pursuant to Judge Steinhardt's order.[21] **(Exhibit D)** In regards to whether Ritz was advised of Judge Steinhardt's order prior to Judge Hickman's telephone call of March 24, 1992 (para. nos. 19, 23), the record clearly indicated these statements found no support within specific court documentation. **(Exhibit E).** And after reviewing these Exhibits, C, D, and E, it is no great surprise that Petitioner only included specific portions of her affidavit, and set forth only paragraphs 3-6 of a status report and motion for reconsideration (filed before Judge Carrigan on January 15, 1992). Petition, pp. 3, 4. A review of the complete status report and motion, **(Exhibit B)**, would again indicate that Ritz

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21/ Below the Respondent alleging that at the request and/or instructions of Ritz, Ms. Heymans not filing this transcript on or about July 1, 1991 as she had agreed would be the filing deadline regarding Judge Steinhardt's order. Subsequently, after Judge Carrigan's order of November 8, 1991, this transcript produced by Ritz as though prepared by Ms. Heymans pursuant to Judge Carrigan's order.

was advised of the existing state court order (Judge Steinhardt's order of March 22, 1991) as so confirmed by Ritz's statement in para. no. 1 that reads:

> 1. On November 7, 1991, the Petitioner moved to complete the record in this case. The Petitioner had examined the record and determined that several transcripts were missing, which he apparently had requested in the course of the state proceedings. (emphasis supplied)
>
> 2. On November 14, 1991, the Respondents were ordered to supply the transcripts of the hearings requested by the Petitioner.

Paragraph No. 2 confirming that Ritz, as the respondent there, was ordered by Judge Carrigan to supply these non-transcribed transcripts. Yet as so shown above in this opposition brief, Ritz did not oppose and/or request Judge Carrigan reconsider his order in regards to the other filed (July 19, 1991) non-transcribed transcribed transcripts, with Ritz producing the November 13, 1987 transcript along with this status report and motion for reconsideration. The only non-transcribed transcripts Ritz opposed and allegedly had the reporters submit false court documentation regarding the availability of these transcripts, were the most pertinent and relevant non-transcribed transcripts.[22]

In **McCray v. State of Maryland**, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "....Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system."

See also the order of this Court denying application for mandamus and

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22/ Ritz could not have accomplished this act, and/or attempted to prevent these transcripts from being filed in the federal habeas proceeding if Respondent with the financial means to have himself paid the reporters to produce these transcripts.

certiorari in **Garrison v. Brown**, 405 U.S. 985 (1972). There was a statutory requirement, 28 U.S.C. 753(b), for Ritz to produce the Respondent's transcripts as ordered by the federal habeas court pursuant to 28 U.S.C. 2254(f) and Rule 5 Governing Section 2254 Cases. Ritz's "supervision" of the trial transcripts, and Ritz's act of herself determining what non-transcribed transcripts were to be made part of the habeas record, have never been part of the **Imbler** progeny as extending immunity to the dereliction of express statutory duties and court orders directly contravenes public policy and undermines the essence of the rule of law. Even more so in this case, as this Respondent was an indigent defendant-petitioner who was subject to on-going discrimination and unlawful acts on appeal solely as a result of his indigency.

CONCLUSION

Being forced to appeal without a transcript creates an inherent risk of error and prejudice. The transcript-not the production of it-is essential to the appellate process. The judicial system should place a premium on enforcement of rules that enhance the administration of justice. Obedience to court orders is crucial to the smooth functioning of the courts. Just as public policy does not support immunity, neither does history. The Court has refused to grant immunity under 1983 where there was no historical or early common law recognition of such immunity...and court reporters did not enjoy absolute immunity under early common law. Accordingly, Petitioner in the role of a court reporter cannot claim absolute immunity.

Thus, Petitioner has not advanced any basis under S.Ct.R. 10 for this Court to exercise its discretion in granting review on writ of certiorari, and the petition should therefore be denied.

DATED: January 10, 1994.

Respectfully submitted,

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No.94-1076

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WENDY RITZ, IN HER INDIVIDUAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Petitioner,

v.

CARY JAMES GAGAN,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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EXHIBIT A

Federal Public Defender's correspondence regarding the dilema created by the transcript delay(s).....A1

Federal Public Defender's correspondence regarding the Magistrate's holding the habeas case in abeyance pending resolution of Rule 35(c) motion.....2a

Response to Court's Order regarding habeas corpus procedures as a result of the transcripts delay(s).....3a-10a

Order of state court dismissing Rule 35(c) motion for a failure of counsel to file a memorandum in support of Respondent's 35(c) claims.....11a

Order of the Colorado Court of Appeals reversing (in part) and remanding with directions the state court's dismissal of Respondent's 35(c) motion.....12a

EXHIBIT B

In its entire form the Status Report and Motion For Reconsideration of Order to Produce the Transcripts.....B1-2b

Affidavit by Reporter Heymans regarding availability of transcript (Oct.5'87) ordered produced by Judge Steinhardt and Judge Carrigan (submitted at request of Ritz)...3b

Certificate of Reporter (Heymans) dated July 20, 1992, showing that October 5, 1987 transcript was available and held on the record.....4b

Affidavit of Reporter Heymans stating notes of October 5, 1987 hearing in possession the entire time of Reporter Hibbard.....5b

Payment voucher for Reporter Hibbard for 45 pages of transcripts that Ritz stated in "Status Report" would be 300 pages of record for the same 4 court hearings that had already been ordered produced by Judge Steinhardt.....6b

Notice of Record Certified To the Appellate Court on July 23, 1992, or one year after the original deadline set by the Reporters themselves had expired.....7b-8b

Complete Response To Status Report filed by Respondent's appointed habeas counsel.....9b-10b

APPENDIX (Continued)

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EXHIBIT C

Petitioner's omitted portion of her affidavit.....C1-2c

EXHIBIT D

Certificate of Reporter (Heymans) confirming that the November 13, 1987 transcript was transcribed on June 14, 1991 (pursuant to Judge Steinhardt's Order).....D1

EXHIBIT E

State court documentation served on Ritz advising Ritz of Judge Steinhardt's Order.....E1

Stamped as Received by the Office of the Attorney General the copy of the state court documentation advising Ritz of Judge Steinhardt's Order.....2e

First page of Respondent's correspondence (May 16, 1991) to Ritz again advising Ritz of Judge Steinhardt's order...3e

Respondent's (pro se) Response to Ritz's Status Report that was served by Respondent on Ritz again informing Ritz of Judge Steinhardt's Order (first page only).....4e

APPENDIX A

Office of the
FEDERAL PUBLIC DEFENDER
DISTRICTS OF COLORADO AND WYOMING
999 18th Street, North Tower, Suite 207
Denver, CO 80201

Michael G. Katz
Federal Public Defender
Charles Szekely
Chief, Trial Division
Vicki Mandell-King
Chief, Appellate Division

(303) 294-7002
FTS 330-7002
FAX 294-1192
FTS FAX 330-1192

April 15, 1992

Cary Gagan
1791 South Filbert Court
Denver, CO 80222

Dear Cary:

As you can see by the enclosed motion, I have done quite a bit of research and given a lot of thought to the dilemma in which we find ourselves. Please call so that we can set up another meeting. Also, please leave a phone number at which we can reach you as neither Caroline nor I know of a present phone number.

Very truly yours,

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division

VMK:ldw

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(303) 294-7002
FTS 330-7002
FAX 294-1192
FTS FAX 330-1192

May 29, 1992

Cary Gagan
1791 South Filbert
Denver, CO 80222

Dear Cary:

Enclosed is a copy of Magistrate Borchers' order, holding your case in abeyance, pending resolution of your state Rule 35 motion. As you know, in my motion, to which this order is a response, I had indicated a request to amend the habeas petition with unexhausted claims under the circumstances that would not result in dismissal. My interpretation of this order is that the magistrate is hopeful you will be able to exhaust the claims which ideally you would like to add to this habeas petition prior to completing your parole and thus no longer being in custody.

I appreciate your calling me every week since you do not have a phone number at which I can reach you. Please continue to keep me advised of the developments in the state case.

Very truly yours,

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division

VMK:ldw

enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER, et al.,

Respondent.

RESPONSE TO COURT'S ORDER OF FEBRUARY 10, 1992
AND ADDITIONAL REQUESTS

Cary Gagan, by undersigned counsel, for his response to the Court's order of February 10, 1992, states to the Court as follows:

Background in Current Federal and State Cases

As this Court is aware, on January 7, 1991, Mr. Gagan filed pro se his habeas petition in this Court. In that petition he asserts denial of bail, violation of speedy trial, and denial of counsel. Respondents filed an answer to show cause on February 11, 1991. On May 10, 1991, the Federal Public Defender's Office was appointed to represent Mr. Gagan.

On January 29, 1992, this Court ordered that a telephone conference be held on February 4, 1992. During that conference undersigned counsel advised the court of Mr. Gagan's pending Rule 35(c) motion, and that such action may affect the proceedings in federal court. In an order filed on February 10, this Court

ordered that additional time is granted up to and including April 15, 1992 for Petitioner to file any Supplemental Petition or Traverse.

On April 1, 1992, this Court issued an order that counsel advise whether additional transcripts are needed and whether a hearing should be set. On April 10, 1992, Mr. Gagan responded to the Court's order, stating it would be necessary to review additional transcripts in order to file a comprehensive Supplemental Memorandum/Traverse.

On or about August 30, 1991, Mr. Gagan filed pro se in Arapahoe County a Rule 35(c) motion, claiming, inter alia, ineffective assistance of counsel on appeal, variance between the charge and proof, and improper amendment of the information. Terri Harrington was appointed to represent him in December 1991. No memorandum has yet been filed in support of his motion. An evidentiary hearing has not yet been set. That case, like this habeas action, has been complicated and delayed due to the problems in identifying, locating and preparing necessary transcripts. On March 25, 1992, the state court ordered additional transcripts to be filed in thirty days. Ms. Wendy Ritz has advised this Court that those transcripts will be made available to supplement the record in this case.

Mr. Gagan informed counsel he would complete parole supervision in a few months. Contact with the Denver Parole Office indicates he will not be discharged until February 10, 1993,

although that date may be advanced due to calculation of good time to December 1992 or January 1993.

Discussion of Dilemma

The facts that Mr. Gagan is pursuing state and federal relief at the same time, that some but not all claims are ripe for habeas habeas review, and that Mr. Gagan will soon complete his parole term create a procedural dilemma. The dilemma is set forth below.

To amend the pending petition for habeas corpus relief to include additional claims which have not been exhausted in state court would render Mr. Gagan's petition mixed and subject to dismissal under Rose v. Lundy, 455 U.S. 509, 510 (1982); Landano v. Rafferty, 897 F.2d 661, 668 (3rd Cir.), cert. denied, 111 S.Ct. 46 (1990); Johnson v. Lewis, 929 F.2d 460, 464 (9th Cir. 1991); O'Bremski v. Maass, 915 F.2d 418 (9th Cir.1990), cert. denied, 111 S.Ct. 986 (1991)(habeas petition should be dismissed if state remedies are not exhausted as to any of the federal claims.)

However, the exhaustion requirement is a matter of comity and is not jurisdictional. Prather v. Rees, 822 F.2d 1418 (6th Cir. 1987); Snethen v. Nix, 736 F.2d 1241 (8th Cir. 1984), appeal after remand, 885 F.2d 456, cert. denied, 110 S.Ct. 3223 (1990). Jurisdiction is a matter of satisfying the statutory "in custody" requirement. Harrison v. State of Indiana, 597 F.2d 115 (7th Cir. 1979); Bufalino v. Reno, 613 F.2d 568 (5th Cir. 1980)(exhaustion rule does not relate to jurisdiction of federal court but rather

addresses the appropriate exercise of jurisdiction in light of the American system of dual sovereignty).

Mr. Gagan's claim in state court of ineffective assistance of counsel on appeal is subject to the exhaustion requirement. Simmons v. Wainwright, 585 F.2d 95 (5th Cir. 1978). Where a petitioner has filed a collateral attack in state court raising ineffective assistance on appeal which is still pending, the principle of comity would be violated by considering that claim in the habeas action. Horowitz v. Wainwright, 709 F.2d 1403 (11th Cir. 1983). This is Mr. Gagan's situation at the present time.

If Mr. Gagan does not amend the instant petition with the unexhausted claims, it is possible that his subsequent habeas petition could be barred as an abuse of the writ. Rose v. Lundy, 455 U.S. at 521; Lundy, Id. at 538 (White, J., concurring in part and dissenting in part)("[I]f the [district] judge rules on those issues that are ripe and dismisses those that are not, I would not tax the petitioner with abuse of the writ if he returns with the latter claims after seeking state relief."); Powell v. Spalding, 679 F.2d 163, 166 (9th Cir. 1982)(petitioner would be able to refile unexhausted claims in a second petition if he chose to do so)(dictum); Tyler v. Armontrout, 917 F.2d 1138, 1141 (8th Cir. 1990)(petitioner who had proceeded in an earlier petition with only his exhausted claim and had deliberately set aside his unexhausted claims abused the writ when he raised the previously unexhausted claims in a subsequent petition); Rudolph v. Blackburn, 750 F.2d

302, 305 (5th Cir. 1984)(sole fact that petitioner's claim for relief was not exhausted at time of prior federal writ would not excuse failure to include that claim in the prior petition); Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983), cert. denied, 460 U.S. 976 (1984)(petitioner who persists in the prosecution of the federal writ of habeas corpus while aware of additional but unexhausted claims faces the burden of disproving abuse of the writ; that the omitted claim was not exhausted at the time of the first petition is not sufficient to avoid the abuse doctrine); Jones v. Hess, 681 F.2d 688, 695 (10th Cir. 1982)(petitioner who deletes unexhausted claim risks forfeiture of future consideration of that claim as a successive petition); Smith v. Atkins, 678 F.2d 883, 884 (10th Cir. 1982). In Neuschafer v. Whitley, 860 F.2d 1470, 1475, 1476 n. 9-10. (9th Cir. 1988), cert. denied, 110 S.Ct. 264 (1989), the court held that a petitioner does not deliberately abuse the writ if he leaves claims out of a previous petition because he believed in good faith that his claim would be barred until he had exhausted state remedies, and he brings the claims in a later petition after exhausting state remedies. See also, McCleskey v. Zant, 111 S.Ct. 1454 (1991); Worthen v. Kaiser, 952 F.2d 1266 (10th Cir. 1992).

The claim of successive petition can be raised by the state or the Court. Matthews v. Butler, 833 F.2d 1165 (5th Cir. 1987). In Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983), cert. denied 466 U.S. 976 (1984), the court held that where a petitioner is

represented by counsel in an earlier writ, the court considers what petitioner was aware of and counsel's competency in determining abuse of the writ. The Tenth Circuit reached the merits of a third petition in Coleman v. Saffle, 912 F.2d 1217 (10th Cir), cert. denied 111 S.Ct. 22 (1990) See, Paprskar v. Estelle, 612 F.2d 1003 (5th Cir.), cert. denied, 449 U.S. 885 (1980) (second petition did not constitute abuse where, at time of earlier petition, allegations raised in second petition had not been finally acted upon by the state court and were unexhausted).

Dismissal of the present petition without prejudice to refile when Mr. Gagan has exhausted state remedies on his additional claims is not a viable alternative. Rule 41, F.R.C.P, which authorizes voluntary dismissal is not applicable to dismissal of a first petition in order to not have any procedural prejudice attach to those claims. Potts v. Zant, 638 F.2d 727 (5th Cir.), reh. denied, 642 F.2d 1210, cert. denied, 454 U.S. 877 (1981). See also, Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989)(dismissal without prejudice does not constitute a determination on the merits and does not bar a subsequent habeas corpus petition).

Finally, were Mr. Gagan to delay amending his petition until he has exhausted his state remedies, he will no longer satisfy the "in custody" requirement. Section 2254(a), 28 U.S.C., provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only

> on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The "in custody" requirement, unlike exhaustion, is jurisdictional. Gonzales v. Stover, 575 F.2d 827 (10th Cir. 1978) (power of the federal courts to grant habeas corpus relief is available only to persons who are in custody.) In Gamble v. Parsons, 898 F.2d 117 (10th Cir.), cert. denied,111 S.Ct. 212 (1990), the court held the petitioner was in custody even though the challenged conviction had been fully discharged, where petitioner was currently in custody on conviction which had been enhanced by the expired conviction; the petitioner could challenge the present sentence to the extent it had been enhanced by the allegedly invalid prior conviction. See also, Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990). But see, Flittie v. Solem, 853 F.2d 597 (8th Cir. 1988)(district court lacked jurisdiction over habeas petition challenging conviction for which petitioner was no longer incarcerated, but which was used to enhance the sentence he was currently serving; the effect of the conviction was a collateral consequence which did not give rise to jurisdiction to grant habeas relief.)

RELIEF REQUESTED

First, Mr. Gagan requests permission to file the Supplemental Memorandum after additional transcripts are filed to complete the record in this case.

Second, Mr. Gagan requests that this Court hold this case in abeyance pending a resolution of his Rule 35(c) matter. Such action by this Court would be consistent with principles of comity. Also, were Mr. Gagan to prevail in his Rule 35(c) motion, this habeas petition would be moot.

Third, Mr. Gagan requests the opportunity prior to completion of his parole term to amend this habeas petition to include claims raised in the Rule 35(c) motion. It is unlikely Mr. Gagan will be able to exhaust further state remedies prior to completion of his parole term. Therefore, given that the exhaustion requirement is not jurisdictional, the possibility of abuse of the writ, and his custody status, Mr. Gagan requests that this Court allow inclusion of non-exhausted claims in this petition without dismissal as a mixed petition.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

VICKI MANDELL-KING
Assistant Federal Public Defender
Chief, Appellate Division
999 - 18th Street
Suite 207, North Tower
Denver, Colorado 80202
(303) 294-7002

DISTRICT COURT, COUNTY OF ARAPAHOE, COLORADO
Case No. 86 CR 451, Division 11

ORDER

PEOPLE OF THE STATE OF COLORADO, Plaintiff

V.

CARY JAMES GAGAN, Defendant.

This matter is before the Court on the Defendant's Motion to reconsider the Court's order denying Defendant's Motion to Vacate the Judgment and Sentence. The Court has Reviewed the Motion and the entire record in this case and finds that appointed counsel has not filed any pleadings corroborating or supporting Defendant's contentions. Judge Steinhardt never determined that Defendant's August 1991 Motion to Vacate Judgment and Sentence had merit. Based on this Court's review of the record no hearing is necessary to determine the Motion to Vacate Judgment and Sentence. The Motion to Vacate Judgment and Sentence is denied. The request for hearing is denied.

DONE and signed in open court this 2d day of November, 1992.

BY THE COURT:

Deanna E. Hickman

DEANNA E. HICKMAN
District Court Judge

Appeal from the District Court of Arapahoe County State of Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered March 17, 1994 before Ruland, Hume and Kapelke, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 92CA2009
Trial Court No. 86CR451 and 86CR539

PEOPLE V CARY J. GAGAN

This cause came on to be heard on the record on appeal from the District Court of Arapahoe argued by counsel. On consideration thereof, it is ordered that the Order of said Court is AFFIMRED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

Date: June 30, 1994

Patrick H. Stanford
Clerk of the Court

By: Catherine Cunningham
Deputy Court Clerk

COPIES MAILED TO
COUNSEL OF RECORD
Tri. Ct. Judge ~~Tri. Ct. Clerk~~
AND Pro Se
ON 6-30-94
BY a
COLORADO COURT OF APPEALS

COURT OF APPEALS
STATE OF COLORADO
Certified to be a full, true and correct copy
Date 6-30-94
Clerk of Court of Appeals
By C Cunningham
Deputy Clerk

SEAL
COLORADO

APPENDIX B

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

92 JAN 15 P3:05

JAMES R. MANSPEAKER, CLERK
BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

vs.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

STATUS REPORT ON AVAILABILITY OF TRANSCRIPTS REQUESTED BY PETITIONER AND MOTION FOR RECONSIDERATION OF ORDER TO PRODUCE THE TRANSCRIPTS

---

1. On November 7, 1991, the Petitioner moved to complete the record in this case. The Petitioner had examined the record and determined that several transcripts were missing, which he apparently had requested in the course of the state proceedings (Exhibit A).

2. On November 14, 1991, the Respondents were ordered to supply the transcripts of the hearings requested by the Petitioner (Exhibit B).

3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.

4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.

5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not pro-

viding these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.

6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

7. Kathleen Ozog Heymans has prepared a transcript of the hearing held in Division 11 on November 13, 1987, 8 pages @ $2.00 per page, for a cost of $16.00 (Exhibit C). In addition, Ms. Heymans certifies that after reviewing her notes of October 5, 1987, she can find no record of any proceedings in this case on that date (Exhibit D). Janice Hibbard reported the hearings on July 22, 1987; July 24, 1987; September 15, 1987; and September 18, 1987. Ms. Hibbard estimates that there are 300 pages of record to be transcribed, and that she will need approximately 120 days to complete the transcripts.

GALE A. NORTON
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

JOHN DANIEL DAILEY
Deputy Attorney General

ROBERT MARK RUSSEL
First Assistant Attorney General

Wendy J. Ritz

WENDY J. RITZ, 17024
Assistant Attorney General
Appellate Section

Attorneys for Respondents

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

Case No. 87CV1477

REPORTER'S AFFIDAVIT

CARY JAMES GAGAN,

Petitioner,

vs.

PATRICK SULLIVAN, SHERIFF OF ARAPAHOE COUNTY,

Respondent.

I, Kathleen Ozog Heymans, hereby certify that on October 5, 1987, I was the Official Shorthand Reporter of Division 5 of the Arapahoe County District Court, Judge John P. Leopold presiding, and hereby certify that after a review of my docket for October 5, 1987, and a careful review of my notes from that date, that I can find no record of any proceedings held on the record in the above-captioned case on October 5, 1987.

Dated this 6th day of January, 1992.

Kathleen Ozog Heymans

Kathleen Ozog Heymans, CSR, RPR

Sworn before me this 6 day of JANUARY, 1992.

Clerk of the District Court

My commission expires _____.

Clerk of the District Court

DISTRICT COURT SEAL ARAPAHOE COUNTY, COLORADO

CERTIFICATE OF REPORTER

THIS IS TO CERTIFY that, I, Kathleen Ozog Heymans, Certified Shorthand Reporter within and for the State of Colorado, Registered Professional Reporter, Official Reporter for Division Five of the District Court of the 18th Judicial District, sitting in Englewood, Colorado, was present at the time of the hearing on October 5, 1987, in the case set forth in the caption hereto; that I took down in Stenotype all of the proceedings; that my notes of the said hearing were reduced to typewriting by me using computer-aided transcription; and that the foregoing pages do contain and constitute a full, true, and correct transcript of those proceedings.

SIGNED this 20th day of July, 1992, at Englewood, Colorado.

Kathleen Ozog Heymans, CSR

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO
Case No. 86CR539

REPORTER'S AFFIDAVIT

PEOPLE OF THE STATE OF COLORADO,
vs.
CARY GAGAN,
Defendant.

I, Kathleen Ozog Heymans, official reporter in the Arapahoe County District Court, hereby state that on an unknown date a request for a transcript of a hearing held October 5, 1987, in the above-entitled case was forwarded to me.

A careful search was done by me of the notes stored in Division 5 from that date. I went through these notes approximately three times, fold by fold. No record from said proceedings were found and I accordingly filed an affidavit dated January 6, 1992.

On July 15, 1992, Ms. Joanne Keim, Deputy Clerk, forwarded to me an envelope postmarked July 13, 1992, from Reporter Janice Hibbard containing notes from October 5, 1987, which had been stored in Division 2 and were in Ms. Hibbard's possession for a period of time unknown to myself. These notes were clearly marked that I was the reporter of certain Division 2 proceedings held on that date and those proceedings included the hearing in the above-entitled case.

This reporter interrupted work on other transcripts to prepare the transcript from these notes and the transcript was completed and turned in to Ms. Keim within approximately one week after I was aware of the existence of the notes.

Dated this 4th day of August, 1992.

Kathleen Ozog Heymans
Kathleen Ozog Heymans, CSR, RPR

Sworn before me this 4th day of August, 1992.

DISTRICT COURT SEAL

Deputy Clerk

My commission expires _____.

Filed
MAY 20 1992
EILEEN M. MANNING
CLERK OF DISTRICT COURT
ARAPAHOE COUNTY, COLORADO

Pay to: Janice Hibbard
6040 Locust St.
Commerce City, Co
80022

SS# 524-56-6326

TO: Clerk of the Dist Ct.

RE: People v. Cary Gagan
86 CR 539
& 86 CR 451

Ordered by: Ct. Appt Counsel

Voucher For Payment

July 22, 1987 21 pgs @ 2.00	42.00
July 27, 1987 5 pgs @ 2.00.	10.00
Sept. 15, 1987 13 pgs @ 2.00	26.00
Sept. 18, 1987 6 pgs @ 2.00	12.00
Total due →	$90.00

Ok to pay - order previously entered by Judge
JSS 5-11-92
deh.

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO

Case No. 86CR539 U. S. District Court Case No. 91-C-0005

NOTICE OF RECORD CERTIFIED TO THE APPELLATE COURT

PEOPLE OF THE STATE OF COLORADO

Plaintiff

vs.

CARY JAMES GAGAN

Defendant

You and each of you will take notice that the record in the above entitled action has been duly certified and (mailed to ~~XXXXXXXX~~) the office of the Clerk of the U. S. District Court on the 23rd day of July, 1992 A.D.

Date: July 23, 1992

EILEEN M. MANNING
Clerk of the District Court
7325 So. Potomac
Englewood, CO 80112

By: Joanne M. Kern
Deputy Clerk

cc: Office of the Attorney General
Attorney for Plaintiff
Appellate Division
110 - 16th St.
Denver, CO 80202

cc: Terri Harrington
Attorney for Defendant
1623 Washington St.
Denver, CO 80203

Cary James Gagan
1791 So. Filbert St.
Denver, CO 80222

People v. Gagan
86CR539
91-C-0005

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FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

92 JAN 23 P4:37

JAMES R. MANSPEAKER CLERK
BY _____ DEP. CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

v.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

RESPONSE TO STATUS REPORT

Petitioner Gagan, by undersigned counsel, responds to the status report filed by Respondents as follows:

1. The status report informs the Court of the availability and cost of transcripts and also states that these transcripts were not available to the Colorado Court of Appeals and constitute a "failure to exhaust state remedies" and a "procedural default."

2. This case has already been delayed considerably, due to an initial inability to locate portions of the record which were reviewed by the Court of Appeals and counsel's schedule. Counsel is attempting to prepare the supplemental memorandum scheduled to be filed on February 7. Once that is prepared, counsel may be better able to respond to the allegation of procedural default. The record as presently constituted reflects Mr. Gagan was found to be incompetent for a period of time, he proceeded to trial pro se, and the trial was held in his absence. Mr. Gagan filed his appeal pro se and has experienced one frustration after another in obtaining full review of his claims. These facts will have bearing on the claims raised by Mr. Gagan as well as Respondents' claim of procedural default concerning the transcripts.

3. Counsel suggests that the Court order preparation and filing of the requested transcripts. Once the record is complete, the Court can better decide what transcripts are appropriate for the Court to consider in ruling on the merits.

4. When counsel made the request to supplement the record, counsel was unaware that certain transcripts had not ever been prepared. In terms of arranging payment for transcripts, counsel

EXHIBIT

will be happy to prepare the necessary transcript order forms and CJA vouchers. Under such procedure, when such vouchers are approved, payment is made from the Court's budget.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

Vicki Mandell-King

VICKI MANDELL-KING
Assistant Federal Public Defender
999 - 18th Street
Suite 207, North Tower
Denver, Colorado 80202
(303) 294-7002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE TO STATUS REPORT was furnished to Wendy J. Ritz, Assistant Attorney General - Appellate Section, 110 - 16th Street, 10th Floor, Denver, CO 80202 on this the 28th day of January, 1992.

L. Winkler

APPENDIX C

14. Having learned that parts of the record had not yet been transcribed, I tracked down Kathleen Ozog Heymans and Janice Hibbard, the court reporters assigned to the different hearing dates.

15. Neither Ms. Heymans, Ms. Hibbard nor any other court reporter advised me of Chief Judge Steinhardt's Order, or of any existing state court order pertaining to Gagan's transcripts. My conversations with the court reporters were focused on Judge Carrigan's Order.

16. After my conversation with Ms. Heymans, she prepared a transcript of the hearing held in Division 11 on November 13, 1987; and she also certified that she could find no record of any proceeding held on October 5, 1987.

17. Ms. Hibbard pulled her notes and advised me that she had reported the hearings on July 22, 1987, July 24, 1987, September 15, 1987, and September 18, 1987. I informed Ms. Hibbard that the respondents in Civil Action No. 91-C-0005 were going to ask the federal court to reconsider its order requiring production of the transcripts and I asked her to wait to transcribe the hearings until the issue was resolved.

18. My conversations with Ms. Hibbard concerned only the federal court order. Ms. Hibbard did not mention the state court order to me.

19. I did not instruct Ms. Hibbard to not comply with Judge Steinhardt's Order. Indeed, I did not know about Judge Steinhardt's Order.

20. On January 15, 1992, I filed a "Status Report on Availability of Transcripts Requested by Petitioner and Motion for Reconsideration of Order to Produce the Transcripts in Civil Action No. 91-C-0005" which states in part:

> 3. The Respondents tracked down the court reporters who recorded these hearings and discovered that the transcripts requested were never transcribed as part of the state court proceedings. Thus, they were not part of the record reviewed by the state courts.
>
> 4. Given the unique circumstances of this case, the Respondents now ask this Court to reconsider its order to produce the records, and relieve Respondents of the responsibility to produce the transcripts by discharging that order.
>
> 5. The Petitioner's attack on his state court convictions is based in part on a record that was never made available to the Colorado Court of Appeals. This

constitutes a failure to exhaust state remedies as well as an unacceptable bypass of the state judicial system. The Petitioner's procedural default in not providing these transcripts to the Colorado courts bars federal courts from considering these transcripts absent a showing of cause and prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982). Therefore, it is the Respondents' position that the additional transcripts are not necessary for resolution of this case, and should not be considered by this Court.

6. If this Court should nonetheless determine that the requested transcripts are necessary for its consideration of this case, the Respondents request that this Court pay for preparation of the transcripts. Since the Petitioner requested the transcripts he should pay for them; however, he is indigent.

This "Status Report on Availability of Transcripts Requested by Petitioner and Motion for Reconsideration of Order to Produce the Transcripts" is attached as Exhibit G to the "Complaint 42 U.S.C. 1983".

21. As of March 24, 1992, this Court had not ruled on the "Motion for Reconsideration of Order to Produce the Transcripts" in Civil Action No. 91-C-0005.

22. On March 24, 1992, I received a telephone call from Judge Deanna E. Hickman of the District Court in Arapahoe County. Judge Hickman informed me that there was an existing state court order for the preparation of transcripts requested by Mr. Gagan which I had "countermanded".

23. I did not know of Judge Steinhardt's Order, or any existing state court order, until Judge Hickman called and told me.

24. After learning of the state court order, I filed a "Motion to Withdraw Motion for Reconsideration of Order to Produce Transcripts" in Civil Action No. 91-C-0005 on March 30, 1992.

25. Because Ms. Norton is the Attorney General for the State of Colorado, her name appears on pleadings and documents filed by the Attorney General's Office in state and federal court cases in which the Attorney General's Office appears on behalf of a party. Thus, Ms. Norton's name appears on the documents filed in Civil Action No. 91-C-0005.

26. As a result of the large volume of cases handled by the Attorney General's Office, Ms. Norton cannot personally supervise, or participate in, each case.

APPENDIX D

CERTIFICATE OF REPORTER

THIS IS TO CERTIFY that, I, Kathleen Ozog Heymans, Certified Shorthand Reporter within and for the State of Colorado, Registered Professional Reporter, Official Reporter for Division Eleven of the District Court of the 18th Judicial District, sitting in Englewood, Colorado, was present at the time of the hearing on November 13, 1987, in the case set forth in the caption hereto; that I took down in Stenotype all of the proceedings; that my notes of the said hearing were reduced to typewriting by me using computer-aided transcription; and that the foregoing pages do contain and constitute a full, true, and correct transcript of that hearing.

SIGNED this 14th day of June, 1991, at Englewood, Colorado.

Kathleen Ozog Heymans

Kathleen Ozog Heymans, CSR

State of Colorado
Eighteenth Judicial District
Arapahoe, Douglas, Elbert & Lincoln Counties

GREGORY C. LANGHAM
DISTRICT ADMINISTRATOR

ARAPAHOE COUNTY JUSTICE CENTER
7325 SO. POTOMAC ST.
ENGLEWOOD, CO 80112
(303) 649-6382

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
91 APR 16 PM 2:07
JAMES R. MANSPEAKER,
CLERK
BY _____ DEP. CLK

April 1, 1991

Cary Gagan
Huerfano County Jail
500 S. Albert St.
Walsenburg, Colorado 81089

RE: Request for Transcripts

Dear Mr. Gagan:

Please be advised that your March 18, 1991, request to have Judge Steinhardt authorize the preparation of transcriptions of specific hearings has been approved. The appropriate court reporters have been notified.

Sincerely,

Gregory C. Langham
District Administrator

GCL:pd

cc: Joyce S. Steinhardt, Chief Judge
Case File Nos. 86CR539 and 86CR451
Rosemary DeMartini, Court Reporter

GAGAN J. GUNTER
91-C-0005

ON APR 16, 1991 A COPY OF CORRESPONDENCE
FROM DISTRICT COURT JUDGE GREGORY LAFFERTY
TO THE PETITIONER (91-C-0005) WAS
HAND DELIVERED TO THE OFFICE OF THE
COLORADO ATTORNEY GENERAL AT 110 16TH ST,
10TH FLOOR. THE BELOW SIGNED HEREBY
ACKNOWLEDGES RECEIPT OF SUCH ON
THIS APR 16, 1991 DATE

RECEIVED
APR 16 1991
OFFICE OF THE
ATTORNEY GENERAL

Wendy Ritz
Assistant Attorney General
110 16th St., 10th Floor
Denver, CO. 80202

May 16, 1991

Re: CARY JAMES GAGAN
U.S. DISTRICT COURT CASE NO. 91-C-0005

Dear Ms. Ritz:

As you are aware Magistrate Judge Richard Borchers has appointed the Office of the Federal Public Defender to represent me in the above shown case. The public defender handling this matter is:

Vicky Mandall King
999 18th St. #207 (294-7002)

Enclosed please find several documents that would confirm that the Honorable Joyce Steinhardt has ordered the preparation of other transcripts. This Order was pursuant the MOTION FOR PREPARATION OF TRANSCRIPTS AT STATE EXPENSE that I filed and for which you were provided a copy.

In another matter filed with Judge Steinhardt (writ of habeas corpus) in February of 1991, her honor's Order regarding that writ is attached hereto. On page (2), the 2nd paragraph, Judge Steinhardt has indicated the sentence in 86CR539 was appealed and affirmed by the Colorado Appellate Courts. I've contacted the Court of Appeals on whether the sentence itself was appealed and was informed that on each appeal the sentence is reviewed along with the issues presented on appeal. In short, it would appear that I have exhausted my state remedies as to the propriety of my sentence.

I will be requesting of public defender Vicky King that the appropriate motion be filed with the U.S. District Court that would request that this federal court also review the legality of my sentence that includes two counts where, in essence, I was the trial court's newly named "victim(s) of my alleged acts of criminal impersonation. As you may recall I moved for judgment of acquittal on these criminal impersonation counts after the prosecutor had rested. I did so under the theory there was no evidence presented that could show that by assuming the alleged false names of JERRY MCCABE and CARY JAMES I could have injured or defrauded (by attempting to obtain monies) the prosecutor's named victims on these criminal impersonation counts...Farmers Ins. Group and GAB Account Adjusters. Judge Leopold denied the motion for judgment of acquittal and I stood on

4e

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
FEB 13 1992
JAMES R. MANSPEAKER
BY _____ DEP CLERK

Civil Action No. 91-C-0005

CARY JAMES GAGAN,

Petitioner,

vs.

FRANK GUNTER AND ATTORNEY GENERAL FOR THE STATE OF COLORADO,

Respondents.

SUPPLEMENTAL RESPONSE TO STATUS REPORT FILED BY PETITIONER IN SUPPORT OF RESPONSE TO STATUS REPORT FILED BY COUNSEL

Petitioner Gagan, pro se, supplements his counsel's filed RESPONSE TO STATUS REPORT on January 23, 1992, and states as follows:

1. Petitioner's counsel in this case could further apprise this Court that this Petitioner is totally familiar with the entire available record on file in this federal appeal, as well as this Petitioner totally familiar with the content and issues of other state court proceedings/hearings not designated and/or transcribed for the record that was not made available to the Colorado Court of Appeals.

2. That for the purpose of obtaining full review of his claims in both post conviction proceedings under Rule 35(c) of the C. R. Crim. Proc. in the Arapahoe County District Court, as well as having this federal Court have the opportunity to review other pertinent hearings, in March of 1991 this Petitioner filed with the Arapahoe County District Court the incorporated MOTION FOR PREPARATION OF TRANSCRIPTS AT STATE EXPENSE marked Exhibit "A". As so indicated on page 1 of this said motion, on March 22, 1991, Judge Joyce Steinhardt granting the Petitioner's motion for the preparation of transcripts for, in part, the following court hearings held on July 22, 1987; July 24, 1987; September 15, 1987; September 18, 1987; and October 5, 1987.

3. That when reviewing the attorney for respondent's status report regarding the availability of these transcripts on the above shown specific dates (para. no. 7), it becomes apparent that both Janice Hibbard and Kathleen Ozog Heymans (court reporters) failed to comply with Judge Joyce Stein-

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